TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1918

No. [redacted] 201

THE UNITED STATES, APPELLANT,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 2, 1919.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 520.

THE UNITED STATES, APPELLANT,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

1 I. *Original petition and Appendix "A." Filed July 29, 1914.*

In the Court of Claims of the United States. No. 32876. The Atchison, Topeka & Santa Fe Railway Company *vs.* The United States. Petition.

To the Honorable the Chief Justice and Associate Justices of the Court of Claims:

Your petitioner, The Atchison, Topeka and Santa Fe Railway Company, respectfully represents:

I.

That petitioner is a corporation duly organized and existing under the laws of the State of Kansas and owns and operates, and at all times hereinafter stated did own and operate, a system of railway extending from Chicago, Illinois, on the east, to San Francisco and San Diego, California, on the west, and was and is operating also branch lines and extensions from the main lines of said sys-
2 tem, over which said lines and branches petitioner is now, and at the times hereinafter stated was, transporting the United States mails; that the numbers and termini of the postal routes over petitioner's said lines of railway are shown upon the schedule hereunto annexed, marked "Appendix A," and expressly made a part of this petition.

II.

That in the year 1911 petitioner entered into contracts with the Post Office Department for transporting the mails over routes numbers 135051, 135098, 145012, 145058, and 145067, shown upon said "Appendix A," for the quadrennial period from July 1, 1911, to June 30, 1915, at an agreed rate of compensation based upon the average daily weight of mails carried over said routes; that in the year 1910 petitioner entered into like contracts with respect to the other routes shown upon said "Appendix A" for a like period from July 1, 1910, to June 30, 1914; that in each and all of said contracts petitioner agreed to transport the mails, "upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service."

III.

That by section 8 of the act approved August 24, 1912 (37 Stats. L., 557), making appropriation for the expenses of the Post Office Department for the fiscal year ending June 30, 1913, Congress established the parcel post. Said section 8 provided in part:

"That hereafter fourth-class mail matter shall embrace all other matter, including farm and factory products, not now embraced by

law in either the first, second, or third class, not exceeding eleven pounds in weight, nor greater in size than seventy-two inches in length and girth combined, nor in form or kind likely to injure the person of any postal employee or damage the mail equipment or other mail matter and not of a character perishable within a period reasonably required for transportation and delivery."

3 That as a result of the establishment of the parcel post by said act of Congress there was a large increase on the routes of petitioner and the other mail-carrying railways of the United States in the average daily weight of mails carried, upon the basis of which the compensation of petitioner and said other mail-carrying railways is computed under the acts of March 3, 1873 (17 Stats. L., 558), March 3, 1905 (33 Stats. L., 1088), and March 2, 1907 (34 Stats. L., 1212).

That notwithstanding said increase in the average daily weight of mails no provision was made for an increase of the compensation of petitioner and the other mail-carrying railways of the country on account thereof until the passage of the act of Congress of March 4, 1913, making appropriation for the expenses of the Post Office Department for the fiscal year ending June 30, 1914 (37 Stats. L., 791, 797), wherein it was provided:

"That on account of the increased weight of mails resulting from the enactment of section eight of the act of August twenty-fourth, nineteen hundred and twelve, the Postmaster General is authorized to add to the compensation paid for transportation on railroad routes on and after July first, nineteen hundred and thirteen, for the remainder of the contract terms, not exceeding five per centum thereof per annum, excepting upon routes weighed since January first, nineteen hundred and thirteen, and to be readjusted from July first, nineteen hundred and thirteen, until otherwise provided by law."

IV.

That said act of March 4, 1913, originated in the House of Representatives as H. R. 27148. Said bill as it originally passed the House on January 14, 1913 (Cong. Rec., 62d Cong., 3d sess., v. 49, pt. 2, p. 1529), carried an appropriation of $49,000,000 for railway mail pay (Cong. Rec., 62d Cong., 3d sess., v. 49, pt. 2, pp.

4 1471–1472), but made no provision for any increase in the mail pay of the railway companies of the country, including your petitioner, on account of the establishment of the parcel post.

On January 20, 1913, while said bill was before the Senate Committee on Post Offices and Post Roads, the Postmaster General addressed a letter to the chairman of said committee, recommending the insertion in said bill of a provision authorizing the Postmaster General on account of the increased weight of mails resulting from

the establishment of the parcel post to weigh the mails on railroad routes and readjust the compensation of the railroads accordingly. Said letter contained the following statement regarding the increased appropriation needed to carry such reweighing of the mails into effect:

"To defray the expense of such a weighing and for the increased expenditure for railroad transportation resulting therefrom in the fiscal year of 1914, it will be necessary to add the sum of $9,173,000 to the amount previously estimated—$49,661,000—for the item 'Inland transportation by railroad routes,' making the total amount of the estimate for that item $58,834,000. The estimate of $9,173,000 is made up of the following items:

"Estimated increase in compensation on account of increase in weight of regular mails since last weighing	$3,861,000
"Estimated increase on account of parcel post	4,812,000
"Estimated cost of 35 days' weighing and tabulation	500,000
"Total	9,173,000"

That in accordance with the Postmaster General's recommendation the Senate added the following amendment, known as Senate Amendment No. 26, to the bill as passed by the House (Cong. Rec., 62d Cong., 3d sess., v. 49, pt. 4, pp. 4013–4014):

"That on account of the increased weight of mails from the establishment of the parcel post the Postmaster General is authorized and directed to weigh the mails on railroad routes for not less than thirty successive working days, and to readjust compensation from the date of commencement of said weighing at not exceeding the rate provided by law."

That the House refused to concur in said Senate amendment, because of the increased expenditure that would be entailed thereby, whereupon the bill with said amendment was sent to conference (Cong. Rec., 62d Cong., 3d Sess., V, 49, Pt. 5, pp. 4190, 4191, 4253–4255). After a failure to reach an agreement as to said amendment a second conference was appointed, which said second conference drafter an amendment in substitution of Senate amendment No. 26, said substitute amendment being reported to and passed by both Houses of Congress (Cong. Rec., 62d Cong., 3d sess., V. 49, Pt. 5, pp. 4426, 4427, 4458–4463, 4684, 4686–4693, 4765–4770). Said substitute amendment appears in the act of March 4, 1913 (37 Stats. L., 791, 797), as the provision quoted in section III, *ante*.

In reporting said substitute amendment to the House, the managers on the part of the House made the following statement (Con. Rec., 62d Cong., 3d sess., V. 49, Pt. 5, pp. 4765–4766):

"Senate amendment No. 26: * * * The amendment increases the amount appropriated by the House $2,500,000 and provides for

increasing the department's estimate for inland transportation by railroad routes $1,839,000. Provides for a special weighing on all railroad routes and a readjustment on account of the increased weight of mails resulting from the establishment of the parcel post. This would necessitate a weighing of all mails carried and a readjustment for the increase in the weights of the regular mails as well as the allowance for additional increase for parcel post mails, because
6 it is impossible to actually separate the parcel post or fourth-class mails from the others and weigh them separately over the routes carried. The department's estimate of the probable cost which such a weighing would result in for ten months of the fiscal year (assuming a weighing to begin September 1) was $3,861,000 on account of increase of weight of regular mails; $4,812,000 increase on account of parcel post (fourth-class matter), and $500,000 estimated cost for 35 days' weighing and tabulation, making a total of $9,173,000. The department's estimate for probable increase on account of parcel post is 10 per cent of the annual compensation.

"Under the proposed substitute the special weighing is dispensed with and no additional compensation is allowed for increase in the regular mails, and the Postmaster General is authorized to allow 5 per cent annually of the compensation paid on routes on July 1, 1913, for the remainder of the contract terms on all routes excepting those which are to be weighed subsequent to January 1, 1913, and to be readjusted from July 1, 1913. These excepted routes are those which are now being weighed and which will receive through the present weighing an increase on account of the present increase in parcel post or fourth-class mail. Five per cent of the compensation on the routes affected will amount to approximately $2,000,000 a year, which is a very material reduction, under the estimates of the department and the provisions of the Senate amendment. * * *"

V.

That in carrying into effect the said provision of the act of March 4, 1913 (see *ante*, section III), the Postmaster General did not allow petitioner and the other mail-carrying railroads the full five per cent increase thereby provided, but did allow for transportation over the several postal routes of the country increases of varying percentages up to and including the full five per cent provided by the said statute, and that in some instances no increase at all was allowed, all of which is shown by the annexed schedule. Appendix A, expressly made a part hereof.

7 That the increases allowed were based upon estimated increases in the average daily weight of mails carried as a result of the establishment of the parcel post, which estimated increases were certified by the field officers of the department. Such reported per cent of increased weight was added to the average daily weight

of mails carried on the respective postal routes as determined by the last quadrennial weighing of the mails and the new rate per mile per annum that would be earned by the new average daily weight was then ascertained. Thereafter the per cent of increase of the new rate per mile over the old rate per mile was computed and such per cent added to the total compensation on the route as fixed by the last quadrennial readjustment. The increase in compensation thus resulting was not in the same ratio as the increase in estimated weight on account of the parcel post.

VI.

Your petitioner is advised and therefore avers that under said provision of the act of March 4, 1913 (see *ante*, Section III), it is entitled to the full five per cent increase thereby allowed and that the action of the Postmaster General in allowing less than such five per cent increase upon the basis of estimated increases in the average daily weights of mails carried on account of the establishment of the parcel post is entirely without authority of law and in violation of the legal rights of your petitioner; that as a result of the allowance by the Postmaster General of less than such five per cent increase on the postal routes of petitioner, the mail transportation earnings of your petitioner have been unlawfully reduced, the amount of which for the fiscal year ending June 30, 1914, aggregates the sum of, to wit, seven thousand seven hundred and eighty-three dollars and thirty-nine cents ($7,783.39), all of which fully appears from the annexed schedule marked Appendix "A," expressly made a part hereof; that the said sum of money is justly due and owing to
8 it by the United States, the same having been and still being unlawfully withheld from your petitioner by the United States and its postal authorities in the manner and for the reasons herein set forth; that there exists in favor of the United States and against your petitioner no debt, claim, or set-off by which the said amount herein prayed for may or should be reduced; and that your petitioner has made no assignment or transfer of its said claim or of any part thereof or interest therein, except as stated herein.

Your petitioner prays, therefore, that this honorable court will render a judgment in its favor and against the United States in the full sum of seven thousand seven hundred and eighty-three dollars and thirty-nine cents ($7,783.39), the same being due and wholly unpaid.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
By EDWARD CHAMBERS, *Its Vice President.*

STATE OF ILLINOIS,
County of Cook, ss:

Before me, John A. McDonald, a notary public in and for the State and county aforesaid, appeared Edward Chambers, known to me to be the vice president of the Atchison, Topeka and Santa Fe

Railway Company, and made oath before me that the allegations of said petition are true to the best of his knowledge, information, and belief.

EDWARD CHAMBERS.

Subscribed and sworn to before me this 16th day of July, A. D. 1914.

[NOTARIAL SEAL.] JOHN A. McDONALD,
Notary Public.

My commission expires November 14, 1917.

BRITTON & GRAY,
Attorneys for Claimant.

GARDINER LATHROP,
General Solicitor.

9 APPENDIX A.

Atchison, Topeka & Santa Fe Railway Company. Statement showing amount due from the United States on account of payment to the company of less than the 5 per cent increase allowed by the act of March 4, 1913 (37 Stats. L., 797), on routes whose compensation was readjusted for the period July 1, 1911, to June 30, 1915.

[Based on period from July 1, 1913, to June 30, 1914.]

Route No.	Termini.	Amount of pay per annum.	Per cent increase allowed.	Amount of increase.	Increase due had 5 per cent been allowed.	Amount due.
135051	Ancona–Pekin, Ill.	$2,922.36	5	$139.59	$139.59	.....
135098	Chicago, Ill.–Kansas City, Mo.	295,849.10	5	14,792.45	14,792.45	.....
145012	St. Joseph–Henrietta, Mo.	4,352.89	4.27	185.86	217.64	$31.78
145058	Congo Jct.–Kansas City, Mo.	1,628.82	5	81.44	81.44	.....
145067	St. Joseph, Mo.–Atchison, Kans.	1,817.73	2	36.35	90.88	54.53
	Total.	.....	.....	.....	.....	86.31

10 *Statement showing amount due on routes whose compensation was readjusted for the period July 1, 1910, to June 30, 1914, based on period from July 1, 1913, to June 30, 1914.*

Route No.	Termini.	Amount of pay per annum.	Per cent increase allowed.	Amount of increase.	Increase due had 5 per cent been allowed.	Amount due.
150003	Independence, Kans.–Tulsa, Okla.	$11,237.15	5	$561.86	$561.86	.....
153013	Pauls Valley–Lindsay, Okla.	1,265.15	3.27	41.37	63.25	$21.88
153021	Sulphur–Davis, Okla.	462.16	1.84	8.50	23.10	14.60
153025	Kiowa, Kans.–Guthrie, Okla.	9,317.77	4.30	400.66	465.88	65.22
153030	Hutchinson, Kans.–Blackwell, Okla.	9,003.19	3.71	334.01	450.15	116.14
153031	Ponca–Blackwell, Okla.	966.86	1.46	14.11	48.34	34.23
153032	Ripley–Pauls Valley, Okla.	6,845.14	4.23	289.54	342.25	52.71
153035	Arkansas City, Kans.–Purcell, Okla.	34,080.04	5	1,704.00	1,704.00	.....
153038	Wellington, Kans.–Tonkawa, Okla.	2,936.41	2.50	73.41	146.82	73.41
153042	Newkirk–Guthrie, Okla.	11,924.17	5	596.20	596.20	.....
153054	Esau Jct.–Cushing, Okla.	1,220.51	0	.....	61.02	61.02
155004	Lawrence–Gridley, Kans.	6,770.11	5	338.50	338.50	.....
155005	Cherryvale–Coffeyville, Kans.	959.87	5	47.99	47.99	.....
155006	Holliday Jct.–Wellington, Kans.	49,243.79	5	2,462.18	2,462.18	.....
155010	Kansas City, Mo.–La Junta, Colo.	377,303.11	5	18,865.15	18,865.15	.....
155011	Newton–Arkansas, Kans.	26,110.91	4.42	1,154.10	1,305.54	151.44
155017	Florence–Winfield, Kans.	6,280.28	4.04	253.72	314.01	60.29
155023	Emporia–Moline, Kans.	6,068.07	3.56	216.02	303.40	87.38
155026	Atchison–Topeka, Kans.	5,687.10	1.83	104.07	284.35	180.28

Statement showing amount due on routes whose compensation was readjusted for the period July 1, 1910, to June 30, 1914, etc.—Continued.

Route No.	Termini.	Amount of pay per annum.	Per cent increase allowed.	Amount of increase.	Increase due had 5 per cent been allowed.	Amount due.
11						
155030	Florence–Ellinwood, Kans.	$7,979.13	4.26	$339.91	$398.95	$59.74
155034	Burlingame–Alma, Kans.	1,667.66	5	83.38	83.38	.....
155035	Mulvane, Kans.–State Line	45,018.70	2.50	1,165.98	2,250.93	1,084.95
155037	Medicine Lodge–Kiowa, Kans.	1,418.61	3.74	53.05	70.93	17.88
155039	Pittsburgh–Chanute, Kans.	3,106.86	2.99	92.89	155.34	64.45
155041	Ottawa–Emporia, Kans.	17,651.69	5	882.58	882.58	.....
155042	Wichita–Pratt, Kans.	5,720.08	2.41	137.85	286.00	148.15
155048	Attica–Belvidere, Kans.	2,816.42	3.23	90.97	140.82	49.85
155052	Hutchinson–Kinsley, Kans.	18,195.88	5	909.79	909.79	.....
155053	Havana–Cedarville, Kans.	2,344.32	5	117.21	117.21	.....
155055	Quenemo–Osage City, Kans.	881.93	0	.....	44.09	44.09
155059	Great Bend–Scott, Kans.	8,285.29	3.74	309.86	414.26	104.40
155061	Larned–Jetmore, Kans.	2,195.83	3.64	79.92	109.79	29.87
155065	Little River–Holyrood, Kans.	1,125.60	0	.....	56.28	56.28
155066	Strong–Bazaar, Kans.	515.56	0	.....	25.77	25.77
155068	Mulvane–Englewood, Kans.	17,985.97	4.16	710.77	854.29	143.52
155069	Madison–Chanute, Kans.	5,375.55	3.23	108.96	168.67	59.71
155072	Colony–Yates Center, Kans.	1,097.39	0	.....	54.86	54.86
155077	Manchester–Barnard, Kans.	1,932.67	1.91	36.91	96.63	59.72
155088	Strong, Kans.–Superior, Nebr.	11,905.98	1.13	134.53	595.29	460.76
155101	Benedict–Buxton, Kans.	685.71	0	.....	34.28	34.28
155103	Hawthorne–Leavenworth, Kans.	999.92	0	.....	49.99	49.99
155104	Abilene–Salina, Kans.	976.83	0	.....	48.84	48.84
155108	Garden City–Scott, Kans.	1,615.95	4	64.63	80.79	16.16
165006	La Junta, Colo.–Albuquerque, N. M.	179,608.25	5	8,980.43	8,980.41	.....
165027	Holly–Swink, Colo.	4,013.37	5	200.66	200.66	.....
165035	Denver–La Junta, Colo.	44,000.88	3.70	1,628.03	2,200.04	572.01
12						
167001	Lamy–Santa Fe, N. M.	1,659.93	5	82.99	82.99	.....
167003	Isleta, N. M.–Needles, Cal.	207,315.65	5	10,365.78	10,365.78	.....
167006	Rincon–Silver City, N. M.	10,835.54	5	541.77	541.77	.....
167008	Nutt–Lake Valley, N. M.	548.48	0	.....	27.42	27.42
167010	Socorro–Magdalena, N. M.	1,217.31	5	60.86	60.86	.....
167013	Whitewater–Santa Rita, N. M.	803.70	0	.....	40.18	40.18
167016	Clovis, N. M.–State Line, Tex.	23,466.82	5	1,173.34	1,173.34	.....
167017	Hanover Jct.–Fierro, N. M.	274.88	0	.....	13.74	13.74
167027	Clovis–Belen, N. M.	22,261.32	5	1,113.06	1,113.06	.....
167030	Albuquerque, N. M.–El Paso, Tex.	39,305.88	3.01	1,183.10	1,965.29	782.19
168009	Chloride–McConnico Jct., Ariz.	967.00	0	.....	48.35	48.35
176013	Barnwell, Cal.–Searchlight, Nev.	1,047.92	3.85	40.39	52.39	12.05
176038	Los Angeles Jct.–Fallbrook, Cal.	826.78	0	.....	41.33	41.33
176042	Barstow–Needles, Cal.	60,839.86	5	3,041.99	3,041.99	.....
176050	Kramer–Johannesburg, Cal.	1,222.65	0	.....	61.13	61,13
176053	Barstow–Los Angeles, Cal.	56,416.60	5	2,820.83	2,820.83	.....
176055	San Bernardino–Orange, Cal.	7,186.75	2.80	201.22	359.33	158.11
176056	San Bernardino–Highland Jct., Cal.	2,279.26	4.77	108.72	113.96	5.24
176057	Escondido–Escondido Jct., Cal.	1,339.54	4.16	55.72	66.97	11.25
13						
176062	Junction–Corcoran, Cal.	8,204.71	3.60	295.36	410.23	114.87
176063	Los Angeles–San Diego, Cal.	25,300.41	3.26	824.79	1,265.02	440.23
176074	Highgrove–San Jacinto, Cal.	2,865.11	4.60	131.79	143.25	11.46
176085	Blake–Barnwell, Cal.	1,455.46	5	72.77	72.77	.....
176086	Oakland–Richmond Sta., Cal.	464.69	5	23.23	23.23	.....
176092	Elsinore Jct.–Elsinore, Cal.	90.63	0	.....	4.53	4.53
176095	San Francisco–Kern Jct., Cal.	51,606.97	2.98	1,073.42	2,580.34	1,506.92
176103	Mojave–Kern Jct., Cal.	2,286.12	3.77	86.18	114.30	28.12
176109	Barstow–Mojave, Cal.	9,610.75	2.52	242.19	480.58	238.34
176119	Oakdale–River Bank, Cal.	281.72	0	.....	14.08	14.08
176132	Perris–Temecula, Cal.	1,216.12	3.77	45.84	60.80	14.96
165047	Korman Jct.–Lamar, Colo.	217.59	0	.....	10.87	10.87
165049	Waveland Jct.–Las Animas, Colo.	129.96	0	.....	6.49	6.49
165073	Pueblo–Canyon City, Colo.	1,753.17	0	.....	87.65	87.65
	Total					7,783.39

14 II. *Supplemental petition. Filed by leave of court Sept. 27, 1916.*

Supplemental petition.

To the Honorable the Chief Justice and Associate Justices of the Court of Claims:

Your petitioner, the Atchison, Topeka and Santa Fe Railway Company, for its supplemental petition herein respectfully represents:

I.

That it hereby adopts and realleges all the allegations contained in the original petition herein.

II.

That the original petition set forth and claimed losses by reason of the failure of the Postmaster General to grant the full five per cent increase in compensation for transportation of the mails as allowed by law, only to June 30, 1914.

15 III.

That on the routes on which the contract period ran from July 1, 1911, to June 30, 1915, the loss as set forth in the original petition occurred also during the year from July 1, 1914, to June 30, 1915. The numbers and termini of such routes and the amount of loss so occurring thereon are set forth in Appendix "B" hereto annexed and made a part hereof.

IV.

That by reason of the premises as set forth in the original petition herein and this supplemental petition there is now justly due and owing to your petitioner from the United States the sum of ninety-two dollars and eighty-three cents ($92.83), in addition to the sum claimed in the original petition. That there is no debt, balance, or set-off due from petitioner to the United States by which said claim might or should be reduced; that the said claim remains wholly unpaid; and that the said claim has not been assigned in whole or in part.

Wherefore, your petitioner demands judgment against the United States in the sum of ninety-two dollars and eighty-three cents
16 ($92.83) in addition to the sum claimed in the original petition herein.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
By (signed) ALEXANDER BRITTON, *Its Attorney in Fact.*

DISTRICT OF COLUMBIA, *ss:*

Before me, Chester R. Smith, a notary public in and for the District of Columbia, appeared Alexander Britton, to me known and known to me to be a member of the firm of Britton and Gray, attorneys in fact for the Atchison, Topeka and Santa Fe Railway Company, who being duly sworn made oath that the allegations of the foregoing supplemental petition are true to the best of his knowledge, information, and belief.

[SEAL.] (Signed) ALEXANDER BRITTON.

Subscribed and sworn to before me this 26th day of Sept., A. D. 1916.

CHESTER R. SMITH,
Notary Public.

BRITTON & GRAY,
Attorneys for the Petitioner.

17 APPENDIX "B."

The Atchison, Topeka and Santa Fe Railway Company. Statement showing amount due from the United States on account of payment to the company of less than the 5 per cent increase allowed by the act of March 4, 1913 (37 Stats., 797), on routes whose compensation was readjusted for the period July 1, 1911, to June 30, 1915, based on period from July 1, 1914, to June 30, 1915.

Route No.	Termini.	Amount of pay per annum.	Per cent increase allowed.	Amount of increase.	Increase due had 5% been allowed.	Amt. due.
135051	Ancona-Pekin, Ill	$2,922.36	4.77	$139.59	$146.11	$6.52
145012	St. Joseph-Henrietta, Mo	4,352.89	4.27	185.86	217.64	31.78
145067	St. Joseph, Mo.-Atchison, Kansas	1,817.73	2	36.35	90.88	54.53
	Total					$92.83

18 III. *Amendment to Petition. Filed by leave of Court Sept. 28, 1916.*

Amendment to petition.

Comes now the petitioner, the Atchison, Topeka and Santa Fe Railway Company, and begs leave to amend its petition heretofore filed herein as follows:

Paragraph 1 of Article VI change the words "aggregates the sum of, to wit, seven thousand seven hundred and eighty-three dollars and thirty-nine cents ($7,783.39)" to "aggregates the sum of, to wit, seven thousand seven hundred and sixty-eight dollars and thirty-one cents ($7,768.31)."

Likewise in paragraph 2 of Article VI change the words "in the full sum of seven thousand seven hundred and eighty-three dollars and thirty-nine cents ($7,783.39)" to "in the full sum of seven thousand seven hundred and sixty-eight dollars and thirty-one cents ($7,768.31)."

In Appendix "A" amend the items enumerated below to read as follows:

19

Route No.	Termini.	Amount of pay per annum.	Per cent of increase allowed.	Amount of increase.	Increase had 5 % been allowed.	Amt. due.
135051	Ancona-Pekin, Ill	$2,922.36	4.77	$139.59	$146.11	$6.52
155055	Quenemo-Osage City, Kan	879.37	0		43.96	43.96
155066	Strong-Bazaar, Kansas	518.55	0		25.92	25.92
167013	Whitewater-San Rita, N. M	793.86	0		39.69	39.69
176050	Kramer-Johannesburg, California	1,221.79	0		61.08	61.08
176119	Oakdale-River Bank, Cal	288.13	0		14.40	14.40
165073	No claim					
165047	No claim					
165040	No claim					
155030	Florence-Ellinwood, Kan	7,979.13	4.26	339.91	398.95	59.04
155039	Pittsburgh-Chanute, Kan	3,106.86	2.99	92.89	155.34	62.45

It may be said in regard to the above amendments that those of routes 135051, 155055, 155066, 167013, 176050, and 176119 are made to cure discrepancies between the figures shown by the petition and those shown by the report of the Post Office Department; that those of routes 165073, 165047, and 165049 were made because those routes were not established until September 1, 1913, and were not subject to the provisions of the act; and that those of 155030 and 155039 are made to correct errors of computation. The total effect is to
20 reduce the amount shown in Schedule "A" by $101.39. But in drawing the original petition the amount of the table shown on page 9 of Appendix "A," $86.31, was not added to the balance of the claim. Consequently, the true claim is less than that shown in the original petition by the difference between $101.39 and $86.31, or $15.08. The true claim is therefore $7,768.31. The petition as amended agrees in all respects with the report of the Post Office Department.

Respectfully submitted.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Petitioner.

By BRITTON & GRAY, *its Attorneys.*

O. K.
H. D. J.

No objection.
HUSTON THOMPSON,
Assistant Attorney General.
J. W. T.

21 IV. *General traverse.*

Court of Claims.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY Company
vs.
THE UNITED STATES.
} No. 32876.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises having been entered on the

part of the defendants, a general traverse is entered as provided by rule 34.

22 V. *Argument and submission of case.*

On March 20th, 1917, this case was argued by Mr. Alexander Britton for the claimant and Mr. H. D. Jacob and Mr. Joseph Stewart for the defendants, and the case was thereupon submitted.

23 VI. *Findings of fact, conclusion of law, opinion of the court by Campbell, Ch. J., and dissenting opinion by Downey, J., filed April 23, 1917.*

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

Findings of fact.

I.

The claimant, the Atchison, Topeka & Santa Fe Railway Company is a corporation duly organized and existing under the laws of the State of Kansas and owns and operates, and at all times hereinafter stated owned and operated, a system of railway extending from Chicago, Ill., on the east, to San Francisco and San Diego, Cal., on the west, and operated also branch lines from the main lines of said system.

II.

In the years 1910 and 1911 claimant entered into the usual contracts with the United States Post Office Department to transport the mails over a great number of postal routes, the numbers and termini of which are set forth in the petition herein, for the quadrennial terms ending June 30, 1914, and June 30, 1915, respectively; in the year 1911 it also contracted to transport the mails over the postal route known as No. 165027 for the period beginning July 1, 1911, and ending June 30, 1914, the said route having been established on July 1, 1911, within the section where the quadrennial contract period terminated June 30, 1914; on March 2, 1912, it took over the contract theretofore undertaken by the Eastern Railway Company of New Mexico to transport the mails over the postal route designated as No. 167016 for the balance of the quadrennial period ending June 30, 1914; on July 1, 1911, it took over the contract theretofore undertaken by the Garden City, Gulf & Northern Railroad Company to transport the mails over the postal route designated as No. 155108 for the balance of the quadrennial period ending June 30, 1914.

24 In the case of all the routes on which claimant so contracted to transport the mails compensation was at an agreed annual

rate based upon the average daily weight of mail carried over the respective routes. By each and all the contracts mentioned claimant agreed to transport the mails "upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service," over which said lines and branches petitioner is now and at the times hereinafter stated was transporting the United States mails.

III.

Subsequently to the making of the contracts for mail transportation above mentioned, Congress established the parcel post by section 8 of the act approved August 24, 1912, 37 Stat., 557, which reads in part as follows:

"That hereafter fourth-class mail matter shall embrace all other matter, including farm and factory products, not now embraced by law in either the first, second, or third class, not exceeding eleven pounds in weight, nor greater in size than seventy-two inches in length and girth combined, nor in form or kind likely to injure the person of any postal employee or damage the mail equipment or other mail matter and not of a character perishable within a period reasonably required for transportation and delivery. * * *

"That the establishment of zones and postage rates of this section shall go into effect January first, nineteen hundred and thirteen."

As a result of the establishment of the parcel post in accordance with said act of Congress, there was subsequent to January 1, 1913, a large increase of the average daily weight of mail carried on the routes of claimant.

IV.

The act of March 4, 1913, 37 Stats., 791, 797, making appropriations for the expenses of the Post Office Department for the fiscal year ending June 30, 1914, contained the following provision:

"For inland transportation by railroad routes $51,500,000: *Provided*, That no part of this appropriation shall be paid for carrying the mail over the bridge across the Mississippi River at Saint Louis, Missouri, other than upon a mileage basis: *But, provided further*, That the Postmaster General may in his discretion pay within the present law a fair and reasonable price for the special transfer and terminal service at the Union Station at East Saint Louis, Illinois, and at the Union Station at Saint Louis, Missouri, including the use, lighting, and heating of the mail building and transfer service at Saint Louis, Missouri, provided the amount so paid shall not exceed $35,000: *Provided further*, That on account of the increased weight of mails resulting from the enactment of section eight of the act of August twenty-fourth, nineteen hundred and twelve, the Postmaster General is authorized to add to the compensation paid for transportation on railroad routes on and after July first, nineteen hundred and

thirteen, for the remainder of the contract terms, not exceeding five percentum per annum, excepting upon routes weighed since January first, nineteen hundred and thirteen, and to be readjusted from July first, nineteen hundred and thirteen, unless otherwise provided by law."

25 V.

The said act of March 4, 1913, making appropriations for the fiscal year ending June 30, 1914, originated in the House of Representatives. As it passed the House on January 14, 1913, it carried an appropriation of $49,000,000 for the items included under the heading inland mail transportation, but did not contain the provision relative to the increased pay hereafter mentioned.

On January 20, 1913, the Postmaster General addressed to the chairman of the Senate Committee on Post Offices and Post Roads, before whom the said bill was pending, a communication in which he called attention to the desirability of some provision looking to a readjustment of the compensation on railroad routes and suggesting an amendment to the said bill in the form of a proviso to the said item of inland transportation by railroad routes. In said communication the Postmaster General furnished an estimate of the expense necessary to carry out his suggestion that a reweighing of the mails be had, his estimate being that it would be necessary to add the sum of $9,173,000 to his former estimate for said item. The estimate of $9,173,000 was made up of the following items:

Estimated increase in compensation on account of increase in weight of regular mails since last weighing	$3,861,000
Estimated increase on account of parcel post	4,812,000
Estimated cost of 35 days' weighing and tabulation	500,000
Total	9,173,000

The Senate thereafter amended the said item by increasing the appropriation as made by the House therefor to $51,500,000; and besides making a number of amendments to the bill as it passed the House the Senate adopted an amendment to said item of inland transportation by railroad routes which became known as Senate amendment No. 26, and is as follows:

"That on account of the increased weight of mails from the establishment of the parcel post, the Postmaster General is authorized and directed to weigh the mails on railroad routes for not less than thirty successive working days, and to readjust compensation from the date of commencement of said weighing at not exceeding the rate provided by law."

The House, after a conference had been ordered and a conference report had been made, concurred in many of the Senate amendments, but did not concur in Senate amendment No. 26. A further conference was ordered, and at such second conference there was drafted and subsequently reported to each House a substitute for

Senate amendment No. 26, which was to be in lieu of the amended paragraph and to read as follows:

"For inland transportation by railroad routes, $51,500,000: *Provided*, That no part of this appropriation shall be paid for carrying the mail over the bridge across the Mississippi River at St. Louis, Mo., other than upon a mileage basis: *Provided further*, That the Postmaster General may in his discretion pay within the present law a fair and reasonable price for the special transfer and terminal service at the Union Station at East St. Louis, Ill., and at the Union Station at St. Louis, Mo., including the use, lighting, and heating of the mail building, and transfer service at St. Louis, Mo., pro-
26 vided the amount so paid shall not exceed $35,000: *And provided further*, That on account of the increased weight of mails resulting from the enactment of section 8 of the act of August 24, 1912, making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1913, the Postmaster General is authorized to add to the compensation paid for transportation on railroad routes on and after July 1, 1913, for the remainder of the contract terms, not exceeding 5 per cent thereof per annum, excepting upon routes weighed since January 1, 1913, and to be readjusted from July 1, 1913, until otherwise provided by law." * * *

The conference report was agreed to by both Houses and the act was passed in the form above stated.

VI.

In carrying into effect the provisions of the said act of March 4, 1913, the Postmaster General did not allow 5 per cent of the annual rate of compensation on each railroad mail route, nor did he allow an increase of an equal percentage of the annual compensation on all of such routes. He did allow increases of different percentages on different routes varying from 0 per cent in some cases to 5 per cent in others.

VII.

After the passage of the act of March 4, 1913, authorizing additions to compensation on account of increased weight resulting from the enactment of the parcel-post law the department called on its field officers to report the approximate per cent of increase of mails carried on the routes resulting from the establishment of the parcel post. This reported per cent of increased weight was applied to the average daily weight of mails carried on the routes during the last quadrennial weighing of the mails, and the new rate per mile per annum that would be earned by the new average daily weight was ascertained. The per cent of increase of the new rate per mile over the old rate per mile was then computed, and such per cent, unless it exceeded 5 per cent, was then applied to the total compensation on the route

paid on June 30, 1913, the result being the additional compensation allowed from July 1, 1913. Where the per cent exceeded 5 per cent an allowance of that per cent, the maximum named in the law, was made.

A concrete illustration of the said method is as follows:

COMPUTATION TO ASCERTAIN AMOUNT OF PARCEL-POST ALLOWANCE.

Route 153013—Pauls Valley to Lindsay, Okla.

Quadrennial weighing of 1910 showed there was carried on this route an average daily weight of ---- pounds --	338
Division superintendent of Railway Mail Service having charge of the route reported July 25, 1913, there had been an increase in weight as a result of the establishment of parcel post of ---- per cent --	8
Average daily weight parcel post ---- pounds --	27.04
Average daily weight, weighing 1910 ---- do ----	338.00
Average daily weight on route, including parcel post ---- do ----	365.04
27 Maximum rate per mile per annum allowable under R. S., sec. 4002 and acts amendatory thereof for average daily weight of 365 pounds ----	$53.86
Maximum rate per mile per annum allowable under R. S., sec. 4002 and acts amendatory thereof for average daily weight of 338 pounds ----	52.15
Difference ----	1.71

$52.15 $1.71

0.0327, or 3.27%, being within the maximum allowance provided by Congress.

Annual compensation on route as fixed in 1910 ----	$1,265.15
Per cent of increase due to parcel post ----	0.0327
Additional allowance per annum ----	$41.37
Additional compensation fixed in 1910 ----	1,265.15
Total annual compensation ----	1,306.52

Length of route, 24.26 mi. Annual compensation, $1,306.25

$53.855 rate per mile per annum.

Annual compensation, including payment for parcel post ----	$1,306.52
Annual compensation as fixed in 1910 ----	1,265.15
Annual increase on account of parcel post ----	41.37

Length of route, 24.26 mi. Annual increase, $41.37

$1.7055 increase per mile per annum.

A statement of the routes operated by claimant showing their number, termini, pay, and added percentage is as follows:

Statement of Atchison, Topeka & Santa Fe Routes.

Route.	Termini.	Pay per annum, June 30, 1913.	Per cent of income allowed.	Amount income per annum.	Income per annum at 5 per cent.	Difference.
135051	Ancona-Pekin, Ill	$2,922.36	4.77 pt.	$139.39	$146.11	$6.52
			5 "			
135098	Chicago, Ill.-Kansas City, Mo	295,849.10	5	14,792.45	14,792.45	
145012	St. Joseph-Henrietta, Mo	4,352.89	4.27	185.86	217.64	31.78
145058	Congo Jct.-Kansas City, Mo	1,628.82	5	81.44	81.44	
145067	St. Joseph, Mo.-Atchison, Kans	1,817.73	2	36.35	90.88	54.53
153003	Independence, Kans.-Tulsa, Okla	11,237.16	5	561.85	561.85	
153013	Pauls Valley-Lindsay, Okla	1,265.15	3.27	41.37	53.25	21.88
153021	Sulphur-Davis, Okla	462.16	1.84	8.50	23.10	14.60
153025	Kiowa, Kans.-Guthrie, Okla	9,317.77	4.30	400.66	465.88	65.22
153030	Hutchinson, Kans.-Blackwell, Okla	9,003.19	3.71	334.01	450.15	116.14
153031	Ponca-Blackwell, Okla	966.86	1.46	14.11	48.34	34.23
153032	Ripley-Pauls Valley, Okla	6,845.14	4.23	289.54	342.25	52.71
153035	Arkansas City, Kans.-Purcell, Okla	34,080.04	5	1,704.00	1,704.00	
153038	Wellington, Kans.-Tonkawa, Okla	2,936.41	2.50	73.41	146.82	73.41
153042	Newkirk-Guthrie, Okla	11,924.17	5	596.20	596.20	
153054	Esau-Cushing, Okla	1,220.51	0		61.02	61.02
155004	Lawrence-Gridley, Kans	6,770.11	5	338.49	338.49	
155005	Cherryvale-Coffeyville, Kans	959.87	5	47.99	47.99	
155006	Holiday Jct.-Wellington, Kans	49,243.79	5	2,462.18	2,462.18	
155010	Kansas City, Mo.-La Junta, Colo	377,303.11	5	18,865.14	18,865.14	
155011	Newton-Arkansas, Kans	26,110.91	4.42	1,154.10	1,305.54	151.44
155017	Florence-Winfield, Kans	6,280.28	4.04	253.72	314.01	60.29
155023	Emporia-Moline, Kans	6,068.07	3.56	216.02	303.40	87.38
155026	Atchison-Topeka, Kans	5,687.10	1.83	104.07	284.35	180.28
155030	Florence-Ellinwood, Kans	7,979.13	4.26	339.91	398.95	59.04
155034	Burlingame-Alma	1,667.66	5	83.38	83.38	
155035	Mulvane, Kans.-State Line	45,018.70	2.59	1,165.98	2,250.93	1,085.95
155037	Medicine Lodge-Kiowa, Kans	1,418.61	3.74	53.05	70.93	17.88
155039	Pittsburgh-Chanute, Kans	3,106.86	2.99	92.89	155.34	62.45
155041	Ottawa-Emporia, Kans	17,651.69	5	882.57	882.57	
155042	Wichita-Pratt, Kans	5,720.08	2.41	137.85	286.00	148.15
155048	Attica-Belvidere, Kans	2,816.42	3.23	90.97	140.82	49.85
155052	Hutchinson-Kingsley, Kans	18,195.88	5	909.79	909.79	
155053	Havana-Cedarvale, Kans	2,344.32	5	117.21	117.21	
28						
155055	Quenemo-Osage City, Kans	$879.37	0		$43.96	$43.96
155059	Great Bend-Scott, Kans	8,285.29	3.74	$309.86	414.26	104.40
155061	Larned-Jetmore, Kans	2,195.83	3.64	79.92	109.79	29.87
155065	Little River-Holyrood, Kans	1,125.60	0		56.28	56.28
155066	Strong-Bazaar, Kans	518.55	0		25.92	25.92
155068	Mulvane-Englewood, Kans	17,085.97	4.16	710.77	854.29	143.52
155069	Madison-Chanute, Kans	3,373.55	3.23	108.96	168.67	59.71
155072	Colony-Yates Center, Kans	1,097.39	0		54.86	54.89
155077	Manchester-Barnard, Kans	1,932.67	1.91	36.91	96.63	59.72
155088	Strong, Kans.-Superior, Nebr	11,905.98	1.13	134.53	595.29	460.76
155101	Benedict-Burton, Kans	685.71	0		34.28	34.28
155103	Hawthorne-Leavenworth, Kans	999.92	0		49.99	49.99
155104	Abilene-Salina, Kans	976.83	0		48.84	48.84
155108	Garden City-Scott, Kans	1,615.95	4	64.63	80.79	16.16
165006	La Junta, Colo.-Albuquerque, N. M	179,608.25	5	8,980.41	8,980.41	
165027	Holly-Swink, Colo	4,013.37	5	200.66	200.66	
165035	Denver-La Junta, Colo	44,000.88	3.70	1,628.03	2,200.04	572.01
167001	Lamy-Santa Fe, N. M	1,659.93	5	82.99	82.99	
167003	Isleta, N. M.-Needles, Cal	207,315.65	5	10,365.78	10,365.78	
167006	Rincon-Silver City, N. M	10,835.54	5	541.77	541.77	
167008	Nutt-Lake Valley, N. M	548.48	0		27.42	27.42
167010	Sorocco-Magdalena, N. M	1,217.31	5	60.86	60.86	
167013	Whitewater-Santa Rita, N. M	793.86	0		39.69	39.69
167016	Clovis, N. M.-State Line, Tex	23,466.82	5	1,173.34	1,173.34	
167017	Hanover Jct.-Fierro, N. M	274.88	0		13.74	13.74
167027	Clovis-Belen, N. M	22,261.32	5	1,113.06	1,113.06	
167030	Albuquerque, N. M.-State Line (n. o.)	39,305.88	3.01	1,183.10	1,965.29	782.19
168009	Chloride-McConnico Jct., Ariz	967.00	0		48.35	48.35
176013	Barnwell, Cal.-Searchlight, Nev	1,047.92	3.85	40.34	52.39	12.05
176038	Fallbrook Jct.-Fallbrook, Cal	826.78	0		41.33	41.33
176042	Barstow-Needles, Cal	60,839.86	5	3,041.99	3,041.99	
176050	Kramer-Johannesburg, Cal	1,221.79	0		61.08	61.08
176053	Barstow-Los Angeles, Cal	56,416.60	5	2,820.83	2,820.83	
176055	San Bernardino-Fullerton Jct., Cal	7,186.75	2.80	201.22	359.33	158.11
176056	San Bernardino-Highland Jct., Cal	2,279.26	4.77	108.72	113.96	5.24
176057	Escondido-Escondido Jct., Cal	1,339.54	4.16	55.72	66.97	11.25
176062	Junction-Corcoran, Cal	8,204.71	3.60	295.36	410.23	114.87
176063	Los Angeles-San Diego, Cal	25,300.41	3.26	824.79	1,265.02	440.23
176074	Highgrove-San Jacinto, Cal	2,865.11	4.60	131.79	143.25	11.46

Statement of Atchison, Topeka & Santa Fe Routes—Continued.

Route.	Termini.	Pay per annum, June 30, 1913.	Per cent of income allowed.	Amount income per annum.	Income per annum at 5 per cent.	Difference.
176085	Goffs-Barnwell, Cal.	$1,455.46	5	$72.77	$72.77	.....
176086	Oakland-Richmond Sta., Cal.	464.69	5	23.23	23.23	.....
176092	Elsinore Jct.-Elsinore, Cal.	90.63	0	.....	4.53	$4.53
176095	San Francisco-Kern Jct., Cal.	51,606.97	2.08	1,073.42	2,580.34	1,506.92
176103	Mohave-Kern Jct., Cal.	2,286.12	3.77	86.18	114.30	28.12
176109	Barstow-Mohave, Cal.	9,610.75	2.52	242.19	480.53	238.34
176119	Oakdale-River Bank, Cal.	288.13	0	.....	14.40	14.40
176132	Perris-Temecula, Cal.	1,216.12	3.77	45.84	60.80	14.96
165047	Korman Jct.-Lamar, Cal.	217.59	0	.....	10.87	10.87
165073	Pueblo-Canyon City, Colo., est. from Sept. 1, 1913.	.....	.....	.....	.....	.....
165049	Waveland Jct.-Las Animas, Cal.	129.96	0	.....	6.49	6.49
						7,785.67

29 The estimates of the percentage of increase in weights upon which the allowances of additional compensation were made on the various routes of the claimant are as follows:

Route.	Percentage.	Route.	Percentage.
135051	8	155039	6
135098	8	155041	19
145012	6½	155042	6
145058	8	155048	10
145067	6½	155052	20
149049	10	155053	10
150024	15	155055	21
150027	18	155059	10
150035	6	155061	8
150047	10	155065	9
150048	9	155066	22
150049	25	155068	8
150051	15	155069	7
150059	10	155072	18
150063	10	155077	4½
150065	9	155088	4½
150066	6	155101	7
150092	8	155103	4
150093	10	155104	14
150104	10	155108	12
150108	15	165006	10
150116	10	165027	7
150118	9	165035	7
150131	10	167001	15
150132	10	167003	8
150162	8	167006	30
150171	8	167010	25
150172	8	167016	10
150175	12	167027	10
153003	19	167030	10
153009	13	168006	8
153013	8	168013	10
153021	6	168016	8
153025	10	168024	8
153030	10	168027	8
153031	5	176013	10
153032	8	176025	8
153035	15	176042	8
153038	5	176053	8
153042	39	176055	8
155004	16	176056	8
155005	18	176057	10
155006	18	176062	5
155010	20	176063	8
155011	7	176074	10
155017	8	176085	10
155023	10	176086	20
155026	6½	176095	6
155030	9	176103	6
155034	22	176108	8
155035	6	176109	6
155037	10	176132	10

VIII.

By reason of said action of the Postmaster General the claimant received for transporting the mails during the year from July 1, 1913, to June 30, 1914, on the said routes compensation less by the sum of $7,768.31 than would have been received had 5 per cent of the compensation on said routes been added.

There is no evidence before the court to sustain the claim as to routes 135051, 145012, and 145067 for the period ending July 1, 1915.

Conclusion of law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is entitled to recover the sum of $7,768.31 shown in Finding VIII. It is therefore ordered and adjudged by the court that the claimant recover of and from the United States the sum of seven thousand seven hundred and sixty-eight dollars and thirty-one cents ($7,768.31).

The petition as to the amount alleged for the year from July 1, 1914, to June 30, 1915, is dismissed.

Opinion.

Campbell, Chief Justice, delivered the opinion of the court:

In the act of March 4, 1913, 37 Stats., 791, making appropriations for the expenses of the Post Office Department for the fiscal year 1914, there was incorporated a provision relating to compensation on railroad routes "on account of the increased weight of mails resulting from" the Parcel Post System which had become established on January 1, 1913. Excepted from the operation of said provision, were the routes on which the usual quadrennial weighing of mails would occur before July 1, 1913, the beginning of the fiscal year 1914.

The plaintiff company operated a large number of railroad postal routes (75 or more) under contracts with the Postmaster General. The quadrennial weighing of mails on its routes had occurred in 1910 and 1911, effective for the fiscal year 1911 and afterwards unless lawfully changed. In explanation of the "quadrennial" weighings, it may be stated that in execution of his powers and duties under the laws of Congress relative to the transportation of mails by railroads the Postmaster General had divided the United States into four sections comprised of groups of States, and he conducted a weighing of the mails in each of said sections once every four years. Upon the result of these weighings in the several sections, the compensation to be received by the railroads for transporting the mails over routes in the section concerned was adjusted and fixed by contracts, the terms of which are not material in the instant case except as to the amount of the compensation stated therein. The petition avers that plaintiff had entered into contracts with the Post Office Department for

the quadrennial period from July 1, 1911, to June 30, 1915, over a large number of routes mentioned in an exhibit to its petition. As already said, no question as to whether the contracts contained reservations which authorized a change or readjustment of the compensation at the will of the department is involved in this case. We may assume, and, according to our view of the act under consideration, we must assume, that there were existing contracts having some time to run in three of the weighing sections. The Congress recognized as much when they used the words in the act "for the remainder of the contract terms."

The Parcel Post System was established by the act of August 24, 1912, 37 Stats., 557. That system was designed to open the facilities of the mails, under the classification of fourth-class mail matter, to "all other matter, including farm and factory products, not now embraced in either the first, second, or third class, not exceeding eleven pounds in weight," under certain restrictions mentioned in the act. A result which it was naturally to be supposed would follow from making available to said products and other matter the cheaper or more rapid transportation afforded by the mail service was a large increase in the weights of the mails. The extent of the
31 increase could not be forecast. One provision of the act was that "the Postmaster General may readjust the compensation of star routes and screen wagon contractors if it should appear that as a result of the Parcel Post System the weight of the mails handled by them has been materially increased," 37 Stats., 558. The act was silent as to any increase of weights resulting from the system upon railroad postal routes.

In the following year a provision was inserted in said general appropriation act which forms the basis of the plaintiff's claim. That provision is as follows, the words which we have italicized showing the portion which the contentions of the parties are addressed to:

"For inland transportation by railroad routes $51,500,000: *Provided*, That no part of this appropriation shall be paid for carrying the mail over the bridge across the Mississippi River at Saint Louis, Missouri, other than upon a mileage basis: *But, provided further*, That the Postmaster General may in his discretion pay within the present law a fair and reasonable price for the special transfer and terminal service at the Union Station at East Saint Louis, Illinois, and at the Union Station at Saint Louis, Missouri, including the use, lighting and heating of the mail building and transfer service at Saint Louis, Missouri, provided the amount so paid shall not exceed $35,000: *Provided further, That on account of the increased weight of mails resulting from the enactment of section eight of the act of August twenty-fourth, nineteen hundred and twelve, making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, nineteen hundred and thirteen, the Postmaster General is authorized to add to the compensation paid for transportation on railroad routes on and after July first, nineteen hundred and thirteen, for the remainder of the contract terms, not*

exceeding five per centum thereof per annum, excepting upon routes weighed since January first, nineteen hundred and thirteen, and to be readjusted from July first, nineteen hundred and thirteen, until otherwise provided by law." [Italics ours.] 37 Stats., 797.

When the department came to apply said provision they adopted a method which is stated in the findings of fact. Securing estimates of the increase of weights of mails resulting from the parcel post on the several railroad routes which were made by its field agents and with these estimates and other elements as factors, the department made computations to ascertain the increase which should be allowed the respective routes, taking into its consideration section 4002 of the Revised Statutes and amendatory acts. The results obtained by said method were diverse. In some instances upon routes on plaintiff's road the amount of increase allowed was equal to 5 per cent of the compensation stated in the contracts; in others the amount of the increase was below 5 per cent of the compensation, and the percentages varied; while on some routes no addition was made to the contract compensation. The method adopted is illustrated by what was done as to route 153013 set out in Finding VII. It will be seen therefrom that an estimated increase in weight as a result of parcel post was 8 per cent, and the computation adopted resulted in an increase of compensation on that route of 3.27 per cent. But an estimated increase in weight resulting from parcel post on routes 155065 and 155055 of 9 per cent and 21 per cent,
32 respectively, produced under said method no increase whatever in the amount of compensation.

An estimated increase of 6 per cent, as a result of parcel post on route 176095, resulted in an increase of compensation of 2.08 per cent, while the same estimated increase in weight on route 176103 resulted in an increase of compensation of 3.77 per cent on that route, or more than 50 per cent more than upon said route where the estimated increase of weight was the same.

That the method adopted and applied can be sustained upon the theory of defendants that said act, being permissive merely, gave the Postmaster General a discretion to add to the compensation of the several routes 5 per cent thereof or nothing; and that whatever method he adopted is controlling, alike on the plaintiff and the court, may be conceded, but that Congress anticipated that results so diverse could follow an application of the language used by them in the act, we may well hesitate to believe.

We think that one fundamental error in the said method was in the use in it of section 4002 of the Revised Statutes and amendatory acts, as though the act contemplated a restatement by the Postmaster General of the compensation under said section and its amendments. There is nothing in said act which contemplates a change in the contracts further than an addition to the compensation "for the remainder of the contract terms." Nor do we see any force in the plaintiff's suggestion that a correct interpretation of said act involves an examination of "the whole series of statutes relating to railroad mail pay."

We do not here attempt any discussion of those statutes or the rights of parties under them. While we have held in what are called the Divisor cases that the Postmaster General had a large discretion under the act of 1873 and amendatory acts, and while in the *Delaware, Lackawanna & Western R. R. Co. Case*, 52 C. Cls., 326, we had occasion to consider the effect of certain provisions in the contract appearing therein, neither of the questions involved in said cases are here involved. Plainly, the act under consideration is not dealing with compensation for transporting all mails, but confines itself to an increase resulting from parcel-post matter.

The result of the application of the department's method upon the compensation to plaintiff was largely less than 5 per cent of the compensation stated in its contracts, and it sues for the difference between what the Postmaster General allowed under said method and what it would have received if he had applied a flat increase of 5 per cent to the compensation fixed in its several contracts.

The plaintiff contends that the purpose and the effect of said act were to provide for the payment to plaintiff of an addition of 5 per centum to the compensation it was receiving annually under its then existing contracts for transporting the mails.

The defendants insist (1) that the act authorized an increase of compensation "not exceeding 5 per cent:" "that is, that the maximum is 5 per cent, the minimum nothing, and between the two lay the Postmaster General's discretion:" (2) that the authority being permissive and not mandatory, the manner of its exercise by the Postmaster General is not open to question. In amplification of their position the defendants argue that the act contains no positive direction "to allow the railroads any increase whatever," and that if the Postmaster General had refused to allow any increase
33 claimant could have had no cause of action. Assuming the correctness of their premise, it may be conceded that the logic of their argument is sound; but was the authority conferred by the act a power which could be exercised in the discretion of the Postmaster General or left unexercised by him according as his judgment might dictate?

It is well settled that in the construction of an act of Congress the expressions of individual members in debates are not to be considered by the courts in ascertaining the meaning of the language in which the act is finally expressed or the intention of the act itself. Mackenzie v. Hare, 239 U. S., 299, 308.

In *Pacific Coast Steamship Co. case*, 33 C. Cls., 36, 56, the rule is thus stated:

"We must look to what was done by the entire body as the result of the debates rather than to opinions expressed pending the discussion of bills resulting in enactments. Courts take judicial notice of some circumstances outside of an act which go to show its meaning, and in doing so they frequently take a wide range of illustration and investigation from public records, public documents, general and local history, and other matters of such general and public

notoriety as may be supposed to have been in the minds of all the legislators when the act was passed, but they never admit the opinions and evidence of individual witnesses for that purpose."

In a late case the Supreme Court said:

"Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation, Blake v. National Banks, 23 Wall., 307, 319; Bate Refrigerating Co. v. Sulzberger, 157 U. S., 1, 42; Chesapeake Telephone Co. v. Manning, 186 U. S., 238, 246; *Binns* v. *United States*, 194 U. S., 486, 495. But, as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent. See *Mackenzie* v. *Hare*, 239 U. S., 299, 308." [Italics mine.] Caminetti v. United States, decided January 15, 1917, and not yet reported. But it is equally well settled that the court may consider the history of the time, the occasion giving rise to the legislation, the subject-matter of the enactment, and its object or purpose.

The reason for this rule is manifest. The act is not to be taken as a mere abstraction, dissociated from all other statutes, its context, or its purpose, and be dealt with as so many words. The purpose of its enactment and its application to a concrete condition of affairs to which it was intended to be applied must be considered. The object of construction is to find the intention, and that must be given effect if consistent with the language used to express it. Where the language is plain and unambiguous there is no need of or room for construction; but, where words are used which appear to be ambiguous, the effort must be directed to finding the meaning of them which will consist with the intention and dominant purpose of the act rather than a meaning which will defeat the law. Ut res valeat
34 magis quam pereat. The act in question was the result of two conferences between conference committees of the House and the Senate. The following statement shows what led up to the enactment: The Postmaster General in his annual report, dated December 1, 1912, had said that it was expected that the establishment of the parcel post would largely increase the amount of mail to be transported by the railways and that "action should be promptly taken that will provide for them the additional compensation to which they are entitled." He appended to his report the draft of a bill which embodied his ideas on said subject, but it was not enacted. In the estimates which the departments usually furnish to the committee having the matter in charge, as the basis for appropriations, the Postmaster General estimated the sum of $49,661,000 as the sum necessary for the item of inland mail transportation. The House

passed the Post Office appropriation bill carrying an appropriation of $49,000,000 for said item. The Senate amended this item by increasing the appropriation to the sum of $51,500,000 and by inserting in the item an amendment in the following language:

"That on account of the increased weight of mails from the establishment of the parcel post, the Postmaster General is authorized and directed to weigh the mails on railroad routes for not less than thirty successive working days, and to readjust compensation from the date of commencement of said weighing at not exceeding the rate provided by law."

The House refused to concur in several amendments to the general act made by the Senate and a conference was ordered. All of the amendments were disposed of by action on the reports of the conferees to their respective Houses except Senate amendment No. 26, which was the one above quoted. A second conference was ordered, and the conferees drafted and reported to the two Houses an amendment or substitute for said item of inland transportation by railroad routes which included the act in question and which became the law.

Prior to the adoption of said amendment No. 26 by the Senate the Postmaster General had communicated an estimate to the Senate committee as to the cost of reweighing all the mails, including the parcel post, and his estimate showed an increase in amount as a result of parcel post on all routes of over $4,000,000. He estimated that it would require something more than $9,000,000 above the amount appropriated in the House bill to meet the requirements of the items covered in the House bill and the Senate's proposed amendment.

The differences between Senate amendment No. 26 and the amendment as reported by the conferees and subsequently enacted are marked. One fact stands out, however, and that is that the Senate amendment increasing the amount of the appropriation from $49,000,000, as fixed in the House bill to $51,500,000 was not changed, and the only change in the body of the item was the incorporation of the enactment in question shown by italics in the act above quoted.

This review of the history of the act brings clearly into view its subject matter and the purpose of Congress.

From the language of the act it can be definitely found (1) that Congress made an appropriation on account of the increase of mails resulting from the parcel post; (2) that provision was made for three weighing sections and that the fourth was not provided for because a quadrennial weighing of the mails in that section would
34 soon take place, which would determine, with approximate accuracy, what the average daily weight of mails, including parcel post, would be in that section; (3) that Congress recognized the existence of contracts which had been made based upon quadrennial weighings having periods to run; (4) that by said contracts a compensation had been stated to which an addition was to be made because of said increased weight. We think the act prescribes the percentage of increase.

The authorized addition "to the compensation paid for transportation" was to be applied "on railroad routes" on and after July 1, 1913, for "the remainder of the contract terms" in said three sections. Clearly, the addition was applicable to all of the said routes. The railroad routes in all of the country (excluding one section specially excepted) are dealt with comprehensively. The statute does not indicate or say that they were to be considered separately or severally or that additional compensation was to be allowed some and denied to other routes. The authority to add to the compensation "on railroad routes" did not authorize an arbitrary rate on each route but required that the percentage of increase should be equal and be applied to all, the applicable principle being that "equity delighteth in equality."

While the act made an appropriation for the fiscal year 1914, the provision in question was not limited to that year. It extends into the future. "The remainder of the contract terms" refers to the contracts having one, two, and three years, respectively, to run, and the additional compensation authorized was to be "per annum." The act is therefore in the nature of general legislation engrafted upon an appropriation act. It clearly recognizes that because of an increased weight of the mails resulting from the establishment by statute of a system, which was designed to produce the increase, there were equitable considerations which would justify additional compensation to the routes concerned. It makes no difference that the equities arising from the conditions, which had their basis in the parcel-post act, may not be such equities as a court could recognize or undertake to enforce except for the statute, because Congress could recognize them and authorize their enforcement. Congress in said act does recognize them. The act is remedial.

This brings us to the question of what provision is made for paying for said increased weight, and whether the amount of it is left in the discretion of the Postmaster General or is to be found in the proper meaning of the language of the act. As has been said, the defendants contend that the act left the matter of compensation entirely in the discretion of the Postmaster General, and therefore left it for that official to say whether there would be added 5 per cent or less, or, as they argue, the "Postmaster General is authorized to add to the compensation paid for transportation on railroad routes * * * not exceeding five per centum thereof per annum" and therefore to add any percentage of the then existing compensation within the maximum he deemed proper.

This argument is predicated upon the word "authorized" as used in the act when followed by the words "not exceeding five per centum thereof per annum." But is the word authorized to be given the restricted meaning which must be adopted to sustain defendants' contention upon that phase of the question? We think not.

36 The purpose of the act was to afford some measure of compensation for an additional burden upon the transportation com-

panies resulting from the parcel post without disarranging the contracts relating to other mail matter. The Congress knew that under existing contracts some of the routes in the three sections referred to would have to transport the mails for three years; that in two of the sections there would be two years before the contract terms expired, and that in only one of the sections would the contract term end in one year. Congress also knew that the percentage of increase in weight was uncertain, and that an estimate of such increase in 1913 would furnish no solid basis for ascertaining or estimating the increase for later years. The authority to add to the compensation was therefore for the benefit of the routes in said three sections.

The rule of law applicable to such an act is broadly stated in Supervisors v. United States, 4 Wall., 435. The question before the court in that case was upon the meaning of the words "may, if deemed advisable" in an act which declared that "the board of supervisors under township organization, in such counties as may be owing debts which their current revenue, under existing laws, is not sufficient to pay, may, if deemed advisable, levy a special tax, not to exceed in any one year one per cent upon the taxable property of any such county," to be collected as other taxes, kept as a separate fund, and "be expended under the direction of the said county court or board of supervisors, as the case may be, in liquidation of such indebtedness." The counsel for the board insisted that the authority thus given involved no duty; that it depended for its exercise wholly upon the judgment of the supervisors; and that the writ of mandamus applied for should not issue. The Supreme Court did not adopt the view so advanced, but say (p. 446):

"The conclusion to be deduced from the authorities is that where power is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit but for his. It is placed with the depositary to meet the demands of right and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid and who would otherwise be remediless.

"In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion but to impose 'a positive and absolute duty.'" City of Galena v. Amy, 5 Wall., 705; United States v. Thoman, 156 U. S., 353, 359.

In the last-named case the question was whether the word "may" imposed a duty or created a discretion. The opinion by Mr. Justice White (now Chief Justice) says (p. 359): "It is a familiar doctrine that where a statute confers a power to be exercised for the benefit of the public or of a private person the word 'may' is often treated as imposing a duty rather than conferring a discretion," and cites, among others, the said case of Supervisors v. United States, supra.

He adds, however, that the rule as announced by him is by no means invariable, and that its application depends on the context of the statute and on whether it is fairly to be presumed that it was the intention of the legislature to confer a discretionary power or to impose an imperative duty.

37 In United States v. Cornell Steamboat Co., 202 U. S., 184, the question involved a construction of section 2984 of the Revised Statutes, whereby the Secretary of the Treasury is "authorized, upon production of satisfactory proof to him" of certain facts, to abate or refund customs duties. The court declared that while the language of the section is permissive in that it "authorizes" and does not in terms require the abatement or refunding of the duties, they "do not find it necessary to go deeply into the learning expended upon the distinction between permissive and mandatory clauses," but conclude that in a plain case "it would be an imputation upon the good faith of the Secretary to assume that he would refuse to return the duties, notwithstanding the language of the statute may be construed as permissive merely." It is then added: "We think the petitioner is entitled to build his case upon this assumption," and the Supervisors' case is cited. The court held that the Court of Claims had jurisdiction to enforce the claim.

When the Cornell Steamboat case was before the Circuit Court of Appeals, Second Circuit, 137 Fed., 455, the contention was made that section 2984 of the Revised Statutes confided an irreviewable discretion in the Secretary to refund or to refuse to refund, but that court held otherwise.

In Village of Kent v. United States, 113 Fed., 232, it was held in an opinion by Judge Day that where an act authorized a municipal council to do a number of things, among which was an authority to levy taxes to pay interest, there might be a discretion as to some of the matters, but the act was mandatory as to the interest. Judge Day said (p. 237): "We think it plain that the discretion vested in the council to determine the amount to be levied for each purpose does not apply to a purpose such as the payment of interest, which is mainly a matter of mathematical calculation not required to be fixed by the exercise of discretion on the part of the council." He therefore construed the provision as mandatory.

A circumstance which may be noted as indicative of the sense in which the word "authorized" was used in said act is that in the proviso which immediately precedes the provision under consideration and grants to the Postmaster General authority to pay a price not to exceed $35,000 for certain service, the form of expression used is that the Postmaster General "may, in his discretion, pay." Similarly, in other places in the general act we find (37 Stats., 791) a provision that "the Postmaster General may, in his discretion, allow" a certain per diem; a provision for the expenditure "in the discretion of the Postmaster General" of not to exceed $5,000 for

collecting certain information; a provision (p. 798) that the Postmaster General may, "in his discretion," make certain allowances to postal clerks; and in the provision relating to inland transportation of mail by electric and cable cars that the Postmaster General may, "in his discretion," vary the price paid and also that a sum not to exceed $15,000 may be expended "in the discretion of the Postmaster General." Why the Congress saw fit to express the fact that said smaller expenditures were to be made in "the discretion of" the official and to omit the expression as to the much larger expenditure of additional pay to railroad routes is not apparent if, in fact, it was intended to lodge a discretion and not prescribe a duty.

When the act is read in connection with the history of its passage (Lapina v. Williams, 232 U. S., 78) it is clear that Congress
38 was legislating with a definite object in view. That object was the matter of compensation to railroad routes for increase of mails resulting from parcel post. The recipients of the appropriation—those for whose benefit it was made—are as certainly designated, by reference, as if they had been named in the act. They were railroad routes that were receiving compensation under contracts, except those in a specified section, and whose contract terms extended beyond July 1, 1913. The added per cent of the compensation was to be "per annum" and not variable. Senate amendment 26 would have furnished a more definite standard, but it was rejected. Whether rejected because of the expense of its execution or because under its operation the Government would lose the benefits of existing contracts, so far as the normal increase in the mails during the quadrennial periods was concerned, as well as stand to pay under a reweighing a larger sum "on account of the increased weights of mails resulting from" the parcel post, or whether it was rejected because of all of said considerations or others, it can not be positively affirmed. But it is clear that every factor essential to a determination of whether a per cent of compensation was to be added is stated in the act. In our view the adjustment of the matter—the application of the percentage contemplated by the act—involved just such a situation as Judge Day describes in the Village of Kent case, supra, as "merely a matter of mathematical calculation not required to be fixed by the exercise of discretion on the part of the" Postmaster General. We think it is to be assumed that the appropriation was sufficient to allow 5 per cent additional compensation. This assumption can be adopted because (1) it is readily deducible from the figures stated in the act, the Senate having increased the House appropriation by $2,500,000, and only three out of the four sections being concerned; (2) the concluding paragraph in the general act (p. 801) seems designed to supply any deficiencies; and (3) the burden of showing there was a deficiency would seem to rest upon the defendants, and they have not shown it. Belcher's case, 34 C. Cls., 400, 420. In that case, after stating that the question of insufficiency in the appropriation was defensive matter, which the claimant mani-

festly could not prove and should not therefore be called upon to prove. Judge Nott, speaking for the majority of the court, says:

"Congress manifestly believed that they were appropriating money enough to give full effect to the act, and there is nothing shown in this case to justify the court in saying that Congress were mistaken. Not until the legislative mistake is established will the court be justified in entertaining the question whether the provisions of the statute must necessarily fail."

With all the elements for a mathematical calculation stated in the act and a sufficient appropriation provided, can it be reasonably supposed that the Congress intended to vest a discretion in the department such as the defendants claim was vested in this instance, namely, a right to determine that nothing should be added to the compensation and thereby to render nugatory the congressional purpose to add something to the existing compensation because of a recognized condition that produced an increase in the weights of mails and therefore justified some increase in pay?

In Jordan's Case, 113 U. S., 418, it appeared that an act had provided for the refunding to persons named therein of the amount of taxes collected from them contrary to the provisions of certain
39 regulations therein mentioned, the amount to be paid to each of them being set opposite his name. The statute (19 C. Cls., 113) required the Secretary to refund "the amount of taxes assessed upon and collected from the said named persons contrary to the provisions of the regulations issued by the Secretary of the Treasury" June 21, 1865, and published. Under that statute it was contended by the defendants that the act did not appropriate the specific sums mentioned but only so much thereof in each case as is shown to have been assessed and collected contrary to the provisions of said circular. The Supreme Court in affirming the judgment of this court said that the statute left no discretion in the Secretary nor anything for his determination, except the identity of the claimants with the persons named therein, and that the language would not admit of doubt that Congress undertook, as it had the right to do, to determine to whom relief should be accorded and the exact amount which should be paid to each. True, the statute appearing in that case "authorized and directed" the payments to be made, but the contention as to the amounts to be paid was as tenable in that case as in this, if it can be determined that Congress fixed the percentage to be added to the compensation. See also Price's case, 116 U. S., 43.

Whether we adopt the rule as stated in Supervisor's case, supra, or concede that that rule in not inexorable and seek to apply the principle stated in United States v. Thoman, supra, we think the result must be the same. That result is that the use of the word "authorized" in said act does not imply a discretion, but devolved a duty. Nor do we think that because the language was that the Postmaster General was authorized to add "not exceeding five per cent" of the compensation, we must conclude that the act left it in his

discretion to allow 5 per cent or any less per cent he chose, or nothing if he so decided. If there was anything in the act which called for the exercise of some judgment or discretion or some reason appearing therefrom why Congress left the "per cent" to be fixed by the Postmaster General, instead of themselves fixing it, the question could be readily solved. Can it be that they have placed it in the discretion of the department to render nugatory the provision which they considered should be made, for a definite purpose, in behalf of ascertained persons and for which they appropriated money? Or can it be that, intending to provide a definite addition to the compensation being paid, the Congress by the use of the words "not exceeding" have rendered the act, designed to be beneficial, so uncertain that its enforcement by a court is not possible? We think these questions should be answered in the negative. If the act taken in the light of its history, its object, and intention means that Congress intended themselves to fix the per cent of compensation which should be added, and we think they did so intend, then a meaning can be given to the words "not exceeding" which will effectuate their intention. In that event the meaning is that there should be added to the stated and fixed compensation 5 per cent per annum, and not exceeding that per cent. (Scott v. B. & O. R. R., 93 Md., 475, 505; Garby v. Harris, 7 Exch., 591, 21 L. J., 160; United States v. Fisk, 3 Wall., 445; Oates v. National Bank, 100 U. S., 239, 244; The Emily, 9 Wheat., 381, 388; United States v. Freeman, 3 How., 556, 565; Seimens v. Sellers, 123 U. S., 276, 285; Winona, etc., Co. v. Barney, 113 U. S., 618, 627; Endlich on Interp. Stat., §§ 295, 297.

40 In Oates v. National Bank, supra, it is said that the court should not by a too rigid adherence to the letter of the statute defeat the clearly expressed intention of the act.

In Wilkinson v. Leland (2 Pet., 627, 661) it is said that an act of the legislature is to be interpreted according to the intention of the legislature apparent on its face, and "every technical rule as to the construction or force of particular terms must yield to the clear expression of the paramount will of the legislature.

In The Emily, supra, it is said that an interpretation is never to be adopted that would defeat the purpose of the enactment if any other reasonable construction can be found which its language will fairly bear.

The construction for which defendants contend would enable the Postmaster General to decline to make any addition to the compensation of railroad routes notwithstanding the appropriation of money therefor and the right to make it given by the act. On the other hand, unless the words "not exceeding five per cent" be construed to mean something definite the law would fail because of its uncertainty. Both of these views are to be avoided unless we are compelled to adopt the one or the other from the language of the act.

In thus speaking of the power of the Postmaster General to refuse to make any addition, we do not mean that he has done so. We are considering, however, the meaning of the act and the possibilities of

its application if the official charged with its execution had taken the course which defendants insist he was armed with power to do, and in that view we may assert that the act, so far as concerns any benefits to the routes mentioned, could be rendered of no effect. We can not think that Congress intended to confer such a power or discretion or that they did so by the language they used. (United States v. Cornell Steamboat Co., supra; Supervisors v. United States, supra; Moffett Case, 37 C. Cls., 499.)

The facts show that the Postmaster General added different rates of per cent to the compensation on many of the routes, and upon others that nothing was allowed. Let us examine the act with reference to the theory that he could have declined to make any additions and had refused to make any. Could the parties referred to therein have had any relief in this court? An affirmative answer to that question will show that the act is not permissive merely. The Court of Claims has jurisdiction of claims founded upon any law of Congress. It is well recognized that where Congress appropriates a specific sum to be paid to a person or class of persons a claimant thereunder has a remedy in this court, because his claim is founded upon a law of Congress. (Jordan Case, 19 C. Cls., 108, 113 U. S., 418; Hubbell Case, 15 C. Cls., 562; Sanderson Case, 41 C. Cls., 230.) It is also true that where an act creates a right to be paid and provides no sufficient remedy against the Government this court can grant relief. (Medbury Case, 173 U. S., 492; Kaufman Case, 11 C. Cls., 659, 96 U. S., 567.) But where there is no recognition of the claim or class of claims as obligations of the United States they do not constitute liabilities which this court can enforce. (Harllee Case, 51 C. Cls., 342, 350.) Where Congress directs that certain claims shall be determined by designated officers and be paid, and it appears that such officers misapply the law to established facts, the party may sue in this court. (Medbury case, supra.) The basis of the action in such case is that the statute creates a right to
41 payment under the facts therein stated, but gives no remedy for a refusal on the part of the officer to comply with its provisions, and in such case resort may be had to the Court of Claims to furnish the remedy. (Medbury Case, 173 U. S., 492, 497; Newcomber Case, 51 C. Cls., 408, 413.)

In United States v. Cornell Steamboat Co., 137 Fed., 455, the Circuit Court of Appeals considered a case which involved the construction of section 2984 of the Revised Statutes which "authorized" the Secretary of the Treasury "upon production of satisfactory proof to him" of certain facts to abate or refund the amount of import duties paid or accruing upon certain goods. A subsequent section (sec. 3689) provides an appropriation for said abatements or refunds. The suit was brought under the general acts conferring jurisdiction on the district courts concurrently with the Court of Claims. The court's jurisdiction was assailed because it was contended that said sections confided to the Secretary of the Treasury "an absolute and irreviewable discretion to refund or to refuse to

do so." But it was held that where the facts were undisputed there was no authority for the proposition that nevertheless the Secretary might refuse "to allow the refund arbitrarily and capriciously." Calling attention to the intent and object of the act to afford relief to unfortunate importers who might be able to satisfy the Secretary, by sufficient proof, that they came within the terms of the section and that a permanent appropriation was provided therefor, it was said by the court (p. 459):

"It would certainly defeat that object if, after being satisfied that the proofs established all the prerequisite facts which the section called for, the Secretary might nevertheless arbitrarily refuse to make payment."

Jurisdiction was accordingly taken. The case went to the Supreme Court (202 U. S., 184) and we have already referred to what that court said on the subject of jurisdiction.

In a late case in this court of Charles H. Maginnis, 52 C. Cls., —, the court considered the question of jurisdiction under a statute which provides that "in all cases where it shall appear to the satisfaction of the Secretary of the Interior" that a person has paid under the general land laws more than he was lawfully required to pay under such laws such excess should be repaid to him. It was held in an opinion by Judge Booth that the statute did not vest exclusive power in the Secretary to order the excess to be repaid, and that as the obvious intent was to repay any fees illegally exacted relief could be had in this court upon the principle that a claimant entitled to a right by virtue of an act of Congress is also entitled to a remedy for its enforcement. Newcomber Case, supra, Medbury Case, supra.

Applying the principle of said cases to that of a refusal by the Postmaster General to make any addition at all to compensation, what facts could there be about which there could be any doubt? The act makes a sufficient appropriation, declares the object for which it is made, designates by suitable reference the claimants, states the term during which the addition is allowable, authorizes the Postmaster General to make the addition and prescribes that the addition shall not exceed 5 per cent of a fixed compensation. Should not the court take jurisdiction in such a case as being a claim founded upon a law of Congress, because the facts would be undisputed,
42 unless the fact that the act says "not exceeding five per cent" shall be added, renders an ascertainment of the proper per cent impossible? Rather than reach the latter conclusion, would not the court revert to the amount of the appropriation and if necessary apply the per cent justified by the appropriation, not exceeding, however, 5 per cent? Would we not in such case be justified in giving to the words "not exceeding" the meaning above stated? We do not find anything in said act upon which a mere discretion was to operate. The Postmaster General was not charged with a duty of ascertaining the amount of increase of weights. The Congress had

pretermitted that question in rejecting Senate amendment 26. He was not directed to make estimates of the increases. The per cent of compensation was to be "on railroad routes" in three sections and was to stand annually for the remainder of the contract terms.

In Moffett's Case, 37 C. Cls., 499, the court considered the effect of section 3860 of the Revised Statutes, which provides that the Postmaster General "may allow" to certain postmasters out of the surplus revenues of their offices "a reasonable sum for the necessary cost of rent," etc., "to be adjusted on a satisfactory exhibit of the facts"; and further provides that "no such allowance shall be made except upon the order of the Postmaster General." Moffett sued for what he claimed was a reasonable rent for the use of certain fixtures, and the contention was made in that case, as in this case, that the statute was not mandatory but permissive. The court, in an opinion by Judge Nott, said that it seemed evident that Congress could not have intended that the discretion of the Postmaster General should go to the extraordinary length of allowing one postmaster a reasonable sum for the necessary cost of rent, etc., in carrying on the business of his office and, "while having a fund provided by law at his disposal, that he should refuse all reimbursement to another postmaster. The statute, by the term '*may*' [italics ours], allows the Postmaster General to do justice in these matters to his subordinates, the numerous first and second class offices, and at the same time clearly assumes that the Postmaster General will exercise the power conferred upon him." Upon the question of the last clause of the section—that "no allowance shall be made except upon the order of the Postmaster General"—it seemed plain to the court that the said clause was not intended to exclude a second class postmaster from judicial redress, and Moffett was accordingly granted a judgment. The principle decided in that case can be applied in this case. It should not be said that when acting under a statute such as that before us, which provides the basis and rate of additional compensation to designated persons for certain mail transportation, the Postmaster General acts judicially or that his action in the premises is conclusive when brought in question in a court of justice. Wisconsin Central Railroad Co. v. United States, 164 U. S., 190, 205.

We think the rational view of the act is the one we have adopted, namely, that it required the Postmaster General to add 5 per cent to the compensation being paid on all of said routes, and he having failed to do so that the plaintiff is entitled to recover the difference sued for. The plaintiff will have judgment for $7,768.31.

It is so ordered.

Hay, Judge; Barney, Judge; and Booth, Judge, concur.

43 Downey, Judge, dissents:

It is not necessary in this opinion expressing a contrary view of the case that the facts be restated except as may be required in the course of the discussion.

Proceeding at once to the required construction of the legislative provision in question I agree with the conclusion reached as to the

construction to be put on the word "authorized" and that it does not imply a discretion to act or not to act as the Postmaster General may see fit but imposes a duty. It does not follow, however, that there remains no discretion as to his official action in the discharge of that duty. Even though there may be no discretion as between action and nonaction there may still remain a discretion as to the action itself and a discretion which when honestly exercised without evidence of abuse or bad faith may not be reviewed.

It has been frequently held that the proper courts may by mandate direct the performance of a purely ministerial duty. Contra, where the effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment or discretion. Redfield v. Windom, 137 U. S. 636 and cases cited.

In the case of U. S. ex rel. Dunlap v. Black, 128 U. S. 40–48, the Supreme Court said:

"The court will not interfere by mandamus with the executive officers of the Government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but *when they refuse to act in a case at all* [italics ours] or when, by special statute or otherwise, a mere ministerial duty is imposed upon them, that is, a service which they are bound to perform without further question, then, if they refuse, a mandamus may be issued to compel them.

"Judged by this rule the present case presents no difficulties. The Commissioner of Pensions did not refuse to act or decide. He did act and decide." * * *

In Huidekoper v. Hadley, 177 Fed. Rep. 1–9, it is said:

"The rule is also well settled that, although the exercise of discretion will not be controlled by mandamus, yet the writ will lie to compel the person or body in whom the discretion is lodged to proceed to its exercise."

The citations are not for the purpose of attempting to control this case in any degree by the law of mandate but for the purpose of showing a recognition of the principle that there may be a nondiscretionary duty to act and still remain a discretion as to the action to be taken. And applying that principle we are but on the threshold of the case when we conclude that the word "authorized" is to be construed as "directed" and that conclusion is of force only for its own purposes, of no real importance since the Postmaster General did act, and can in no way affect the question as to whether he had a discretion in the manner of his action.

The Postmaster General is the head of an executive department. With reference to the duties generally of such officers the Supreme Court, in Decatur v. Paulding, 14 Peters, 497, said:

"In general, such duties, whether imposed by act of Congress or by resolution, are not ministerial duties. The head of an executive department of the Government, in the administration of the

44 various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is from time to time required to act. If he doubts, he has a right to call on the Attorney General to assist him with his counsel; and it would be difficult to imagine why a legal adviser was provided by law for the heads of departments, as well as for the President, unless their duties were regarded as executive, in which judgment and discretion were to be exercised."

It of course does not follow that purely ministerial duties involving no discretion may not be imposed on heads of executive departments. Indeed the Supreme Court has held in at least one case that the duties there under discussion which were imposed on the Postmaster General were purely ministerial, a mere matter of bookkeeping. But it seems to me quite in consonance with our general scheme to entertain the view primarily and generally that duties imposed on heads of executive departments are executive duties and not ministerial and to entertain that view to the extent that in determining, in a given case, involving any element of doubt, the nature of the duties imposed we are to consider them in the light of the broad interpretation of the duties of such officers and if it does not with reasonable certainty appear that it was the intention of Congress to impose a purely ministerial duty, devoid of any discretion, the presumption must be that to the extent that the question is left open or in doubt the intention was but to impose another duty to be discharged within the broad rule applicable generally to the duties of such executive officers. Otherwise put, I think it may be said that in a case involving doubt as to the character of the duties imposed we may properly consider the powers and duties generally of the officer on whom they are imposed. Lest I be misunderstood at this point I may here say that I do not regard the question in this case as possessing any considerable element of doubt. The views above as to the duties generally of a head of an executive department are intended to carry with them such weight as they may be entitled to in reaching a final conclusion. It may not be inappropriate to add that aside from his general discretion as an executive officer Congress has so frequently as to almost establish a practice placed within the discretion of the Postmaster General important matters in connection with the postal service.

Assuming then the correctness of the conclusion that Congress did not intend by the use of the word "authorized" to leave it to the Postmaster General, in his discretion, to act or not act at all in the matter as he might see fit, we must determine whether in the action to be taken he was simply to apply a 5 per cent increase to all compensations paid for railway mail transportation, a mere matter of simple mathematics, a purely administrative duty, or whether he had some discretion in the bestowal of the increases.

The language of the act is not exceeding 5 per cent. It is noticeable in this instance that the omission of the words "not exceeding"

would in no way affect the phraseology or grammatical construction of the sentence in which they are used. No reconstruction would be required to make perfect sense and without them there would be a plain specific declaration that the proposed addition to the compensation should be 5 per cent. If that was the intention, why
45 the injection of words wholly unnecessary to the expression of the intention and calculated to raise a doubt as to it? Under every rule of construction we are to presume that the words used were used for a purpose and are required, unless in irreconcilable conflict with other words, to give them their proper meaning. In construing a statute full effect, if possible, must be given to every word, clause, and sentence and none are to be regarded as superfluous or insignificant. If these words are not intended in this instance to relate to the amount of increase and to carry the usual implication that the stated per cent of that increase is not a fixed percentage necessarily to be applied in all cases but is the maximum authorized increase, then some other application for the words must be found. No word in a statute is to be treated as an "intruder" and eliminated from the statute if its use is consistent with other words used in connection with it. U. S. v. Verde Copper Co., 196 U. S. 207-213.

The words in question are found in an appropriation act and in a clause thereof appropriating money for inland transportation of mails. They must apply in some form or other to payment to be made and if they do not apply specifically to the percentage rate of increase to be paid each railroad under each of its contracts for carrying the mails they must apply either to an increase in gross of the compensation for transportation or in some peculiar way to the amount of the appropriation. There is no other element in the legislation of such a nature as to permit any possible application of the words in question. It seems sufficient as to the first proposition to say that the application of these words to gross compensation of all railroads rather than to increased payment to each can not serve to change the conclusion to be reached as to their meaning. An increase in gross payment of "not exceeding 5 per cent" is no more to be interpreted as an absolutely directed 5 per cent increase than is a provision for an individual increase of "not exceeding 5 per cent" to be so interpreted. No reason applies to one which does not apply to the other. There can be no application of the phraseology in question to the amount of the appropriation unless it can be determined that, having ascertained the amount necessary to be appropriated for inland transportation of mails, Congress, in connection with the provision for additional compensation on account of parcel post, increased the appropriation by 5 per cent. This fact is only inferentially shown, but conceding it to be true, as it probably is, it can have no significance. If Congress intended to authorize a discretionary increase with a maximum limit of 5 per cent it could not know that the full authorized increase would not be paid in all cases and it was necessary to make that full amount available by appropriation. Such is the practice in all such cases and the only reasonable

method of procedure, and if it could be demonstrated that Congress in fact increased the amount of the appropriation by the exact amount necessary to pay a flat 5 per cent increase, that fact, in the face of any language implying a discretion, could only mean that Congress made it possible for the official in whom the discretion was vested to exercise it to the limit if he saw fit. He could not do it unless the appropriation were so made.

But all this can, in my opinion, aid but little, if any, in reaching a correct conclusion as to the meaning of the act. There is no more authority for transposing words or sentences unnecessarily
46 than there is for disregarding them. They are found in connection with the percentage of increase; they were intelligently used in that connection, and in that connection they must be interpreted. Further, they must mean something. All words mean something, and none may be arbitrarily disregarded. Their meaning is to be determined from the connection in which they are used, and their relation to other words associated with them. The proper province of some words is to modify other words and as used in this act the modifying force of the words "not exceeding" is directed to the words "5 per cent," and they must serve to remove or modify the absolute character of the latter words unless some good reason can be found for disregarding them.

With reference to the defendant's contention that there is a discretion vested in the Postmaster General within the maximum stated, it is said that this argument is predicated on the word "authorized" as used in the act when followed by the words "not exceeding 5 per centum thereof per annum," and the meaning to be given the word "authorized" is discussed in the light of the authorities. If this statement correctly indicates the basis of the defendant's contention, then, in my opinion, the fault is in the argument used and not in the result. Conceding, as I have already done, the question so far as the interpretation of the word "authorized" is concerned, and as to the argument of the Chief Justice in that respect, I take no exceptions but am in accord, we revert to the proposition I have already stated that even though there be a nondiscretionary duty to act there remains a discretion as to the action to be taken, found, not in the word "authorized," but, by necessary implication and usual rules of interpretation, in the words "not exceeding" and in the otherwise entire absence of necessity or reason for their use. For, in addition to the observation that without them the act would require a straight 5 per cent increase, they would be wholly unnecessary for the purpose only of limiting a directed 5 per cent increase to that amount, for under every rule of interpretation of appropriation statutes a specific direction to increase 5 per cent would be held to limit to that amount the authority to increase.

In our process of interpretation we come now to consider the proposition but for which the argument in favor of a flat increase of 5 per cent must be without any substantial foundation. It is found in the

argument that the act required that the percentage of increase should be equal, that the plan adopted was inequitable and the invoking of the principle that "equity delighteth in equality." I find no fault with the principle nor with its general application or with its application to this case. In my judgment it has not been disregarded, and the exercise of a discretion does not necessarily result in its violation. From one standpoint it is to be conceded that the principle has seemingly been disregarded, but I am inclined to think there is another and a different view of the transaction resulting necessarily in a different conclusion.

There are apparently two possible views with reference to the effect of this particular contention, and perhaps they should be considered. Assume the proposition to be that the procedure on the part of the Postmaster General under this act was inequitable, a violation of the principle stated. Does the inequity of the plan
47 adopted go to the question of the construction of the act and furnish basis for the conclusion that Congress, presumably intending no such inequity, must have intended a flat and equal increase of 5 per cent without discretion in the matter, or does it support and justify the conclusion that, conceding a discretion in the Postmaster General, there was such an inequitable use of the discretion to the detriment of the intended beneficiaries as to give them a remedy in the courts notwithstanding the imposed discretion?

In either event there would be no occasion to question the jurisdiction of this court, and what is said on that subject is concurred in. If, under a discretion, the Postmaster General's action was "arbitrary and capricious," terms used by the Supreme Court, to the detriment of a beneficiary, or not in good faith, such an abuse of discretion could conclude no one and the courts would furnish a remedy. But, as I undestand what has been said, it is not concluded that there was a discretion which it is shown was improperly exercised, but that there was no discretion granted, and the inequity of the plan is suggested in furtherance of the argument to that end.

It would seem apparent that if the inequity of the plan adopted is to become a legitimate basis, either in whole or in part, for the conclusion that there was no discretion vested, it must necessarily be accompanied by the conclusion that that plan was the only plan available under a discretionary authority. Otherwise it can not serve to exclude the idea of a discretion, but indicates an improper use of the discretion. The difference is material, since it goes to the question of whether there was or was not a discretion, and, if standing alone, it tends only to support the theory of an abuse of discretion, it is of no value in support of the conclusion that there was no discretion.

But I am not prepared to concede that there was any such inequity as would support either contention. On the contrary, judged in connection with the whole system of railway mail pay, which we are certainly not now to regard as unauthorized, I am inclined to the

opinion that it developed more of equity than any other possible plan, at least more of equity than a straight 5 per cent increase.

Preliminarily, attention has been called to the fact that a Senate amendment to the Post Office bill directed the Postmaster General to weigh the mails for not less than 30 successive working days and to readjust compensation from the commencement of said weighing at not exceeding the rate provided by law, and that the House refused to concur in this amendment, as a result of which the provision as now under consideration was written. This matter of legislative history is for consideration for what it is worth. But how does it sustain a contention against the theory of a granted discretion? The record doesn't tell us why one provision was rejected and the other adopted. If we are to theorize we might conclude that the expense of the weighing for 30 days was influential, but with more reason we may conclude that the potent consideration was the fact that the proposed plan, in the midst of contract periods, would necessarily result in giving the railroads having contracts the benefit, for the remainder of those periods, of the normal increase in mails other than parcel post, a benefit which otherwise and under the regular system would not accrue to them until in the separate sections
48 they became entitled to the regular quadrennial weighing. If this was, perchance, the controlling motive, the Postmaster General, under his plan, did not operate counter to the legislative intent. While his plan did involve, in a sense, a readjustment of compensation under the usual schedule of relative compensation and weights, it did not involve or take any account of increased weights of mails other than parcel post.

Under the system long in use for determining the contract compensation for carrying the mails, it was not in all cases in the same proportion to the weight carried. For a larger average amount of mail per day the contract called for a lesser rate per pound. Under statute, the maximum authorized allowance for 200 pounds was $50; for 500 pounds, $75; for 1,000 pounds, $100, etc. The first 200 pounds authorized a payment of $50, an increase of 300 pounds as between the first and second classification brought an authorized increase in compensation of $25, while as between the second and third classifications it required 500 pounds of increase in weight to authorize the same increase in compensation. That there might be some fair apportionment of the compensation between the amounts fixed as the maximum for the weights stated, a schedule was devised further graduating the compensation. It was of course impracticable to compute compensation on the basis of actual average, to the pound, of mail carried, and therefore, on the basis of the statutory maximums stated, subject to later enactments as to readjustments of compensation, increased weight from 200 to 500 pounds was divided into 25 units of 12 pounds each as to each of which there was apportioned $1 of the authorized increase of $25 in compensation. For the increased weights between 500 and 1,000 pounds the units were 20 pounds and no allowance was made for any portion of a unit in either case. Thus

the nearest approach to absolute equality deemed practicable resulted in paying the same compensation for 260 pounds per day as for 250 and the same for 519 pounds as for 500, while one road hauling 262 pounds per day received $1 per mile per annum more than a road hauling 261 pounds, and a road hauling 520 pounds received $1 per mile more than a road hauling 519 pounds. This has never been regarded as inequitable, although a weight in one case of 11 pounds and in the other of 19 pounds per day produced no compensation, while 1 pound more produced an added $1 per mile. The system is, in principle, of common application. In recent cases we have had for consideration, involving transportation of troops, we have had before us a system of rates devised by the railroads themselves under which to avoid infinitesimal splitting of fractional rates for transportation in excess of a given distance, and to protect a rate for that distancee the railroad companies received the same compensation for carrying a soldier 343 miles that they received for carrying him 300 miles, although they received an increased compensation for carrying him 344 miles. The situation outlined, for present purposes, shows only that the established system has never been free from possible inequalities, although never regarded as therefore fatally inequitable.

The purpose of the legislation under consideration was to provide additional compensation to the railroads for carrying increased weight of mail on account of the parcel post. It appears from
49 the record in the case that the approximate increases on the routes in question over the plaintiff's lines varied from 4 to 39 per cent, an increase in one case of nearly ten times that in another. For the purpose of determining the equities of the proposition resort to the extremes is certainly proper; but suppose we take it on a comparative mean basis, a certainly conservative method of test not required. It happens peculiarly that of the 104 routes here involved upon which the percentage of increase was estimated the increase in just half is under 10 per cent. The average increase on these 52 routes was 7.18 per cent. On the other 52 routes on which the increase was 10 per cent or more the average increase was 14.54 per cent, so that the average increase on the 52 of highest per cent of increase was double the average on the other 52. But, aside from these figures, we must know—indeed, it appears from the act itself—that the parcel post was yet young, and if there were cases on the plaintiff's lines showing an increase of only 4 or 5 per cent it is not unreasonable to assume the possibility that there might have been even less increase in some parts of the country, and so small, if any, in some instances as to be wholly negligible. In the face of these conditions, presumptively known at least in a general way to those called upon to legislate with reference thereto, is it to be presumed that Congress intended an equal percentage of increase to all without regard to the increased service rendered and, indeed, without regard to whether any increased service at all had been rendered? And is it inequity because, in such

circumstances, the Postmaster General did not bestow compensation equally to all without regard to service rendered?

The Postmaster General took the ascertained percentage of increase in the amount of mail carried on the basis of the last weighing and, adding it to the original amount, he applied the established rule as to the compensation for the resultant amount of mail. If, perchance, in a case cited it resulted in no increase, it was because the increase was so small that the amount remained within one of the units above referred to, or because the compensation was already up to the maximum allowable for the total weight. If in two cases the same percentage of increase in weights resulted in a different increase in compensation, it was because the increased weight added to the differing original weights carried the total weights into different units, or because, possibly, being in different statutory classifications the unit of increase was different. In any event, the only inequality was the same inequality always existing under the established system referred to above and never regarded as a fatal inequity.

But there is yet another feature of the matter which seems to me worthy of consideration. The increases thus to be provided for were only to apply to the divisions having contracts yet to run under former weighings for one, two, and three years. It did not apply to the other division within which a quadriennial weighing was due and within which the parcel-post mail, at that weighing, would be absorbed with the other mail, and compensation for all fixed on the usual basis. Is equity to be determined in the one case, as between the roads in the three divisions, by a hard and fast rule of equal percentage of increase without relation to service, and by another rule as between those three divisions and the fourth division on which a reweighing was to occur? Why did Congress except this one division from the operation of this provision? Clearly and only because the reweighing was to occur as a result of which the roads in that division would be paid for parcel post on the usual basis as other mail was paid for, and just as the Postmaster General under his plan paid the roads in the three divisions. Assume in one of the extreme cases where no increase was paid that that route was within the excepted division and that, without increase in the normal mail other than parcel post, there had been the same percentage of increase on account of parcel post—the result as to its compensation would have been the same. And if, perchance, there was carried over another route in one of the three divisions the same amount of mail, according to its last weighing, with the same increase in parcel post, instead of both faring alike, as they would under the Postmaster General's plan, one would receive no increase and the other would receive the prescribed 5 per cent. As between all the roads in all the divisions, it seems to me the plan adopted was the only plan possible to put them all on the same basis, leaving only such inequities as have always existed under the present system and under the same circumstances.

It is argued that Congress rejected a reweighing plan and probably because it would result in a readjustment of compensations paid not only on account of parcel post, but also on account of the normal increase in other mails and that the Postmaster General by his plan did, in this respect, just what Congress did not intend should be done. But this view of the matter, I think, is founded on error. There was no procedure on the part of the Postmaster General which served to give any of the carriers the benefit of any normal increase in mails other than parcel post. The percentage of increase on account of parcel post was determined by using the weight of mails carried, as shown by the last weighing, as the basis. It was an estimated percentage of that weight and the adjustment was on the basis of the addition of the percentage of increase to that weight and that weight alone.

Contrary to the views entertained when this matter was first presented I am convinced, after careful study of the matter, that the plan adopted by the Postmaster General was not only an equitable plan but the only equitable plan. Compensating the carriers for increased mails carried under an authority which limited increases to 5 per cent, the more pronounced inequities must fall on those carriers which might have been entitled to more than the stipulated percentage under the plan adopted, but for the limitation, and such inequities spring from the limitations of the law itself. Those to whom lesser payments were made were compensated, under the established plan, and based on the service rendered, in the same proportion as those receiving the full authorized increase. The apparent inequities were for the reason already stated.

It seems to me that the argument in support of a flat 5 per cent increase construction, without discretion, which is predicted on the alleged inequities of the plan adopted must fail for any purpose.

For the reasons stated I am of the opinion that the act in question vested in the Postmaster General a discretion as to the increases to be paid which he might very properly regulate upon any reason-
51 able basis in proportion to service rendered and that he acted in the exercise of such discretion and in so doing did not act arbitrarily or capriciously or in bad faith. The exercise of a judgment or discretion, when not arbitrary or capricious, or in bad faith, is not subject to revision.

52 VII. *Judgment of the court.*

At a Court of Claims held in the city of Washington on the 23rd day of April, A. D. 1917, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the Atchison, Topeka and Santa Fe Railway Company have and recover of and from the defendants, the United States, the sum of seven thousand seven hundred and sixty-eight dollars and thirty-one cents ($7,768.31).

By the Court.

53 VIII. *Application for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 23rd day of April, 1917, in favor of claimant, the defendants, by their Attorney General, on the 22nd day of May, 1917, make application for and give notice of an appeal to the Supreme Court of the United States.

HUSTON THOMPSON,
Assistant Attorney General.

Filed May 22, 1917.

Ordered, That the above appeal be allowed as prayed for.

BY THE COURT.

May 22, 1917.

54 In the Court of Claims.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
vs.
THE UNITED STATES. } No. 32,876.

I, Sam'l A. Putman, chief clerk, Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law filed by the court; of the opinion of the court by Campbell, Ch. J.; of the dissenting opinion by Downey, J.; of the judgment of the court; of the application of the defendants for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims at Washington City this 24th day of May, A. D. 1917.

[SEAL.]

SAM'L A. PUTMAN,
Chief Clerk, Court of Claims.

[Indorsement on cover:] File No. 25,987. Court of Claims. Term No. 520. The United States, appellant, vs. The Atchison, Topeka & Santa Fe Railway Company. Filed June 1st, 1917. File No. 25,987.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1917

INDEX.

CASES CITED.

STATUTES.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

UNITED STATES, APPELLANT,
v.
ATCHISON, TOPEKA & SANTA FE RAILROAD Company, appellee. } No. 201.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This action was brought by the Atchison, Topeka & Santa Fe Railroad Company to recover of the United States $7,768.31 claimed to be due it under the act of March 4, 1913 (37 Stat. 791,797), as compensation for carrying the mails. The Court of Claims rendered judgment (R. 41) in favor of the railroad company for that amount. The defendant appealed.

THE FACTS.

The statute establishing the parcel post (act of August 24, 1912, 37 Stat. 557, sec. 8) went into effect January 1, 1913. The mails were then being carried by the railroads under contracts made in pursuance

of Revised Statutes, section 4002, as amended. This section requires compensation to be based upon the average daily weight of the mails carried, as ascertained by the actual weighing of the mails for a number of successive working days. It provided certain maximum rates for various weights of mail carried. The Postmaster General had divided the United States into four groups of States, in each of which he conducted a weighing of the mails once every four years. In these sections the mails had been weighed, respectively, in 1909, 1910, 1911, and 1912, and contracts had been made with the railroads for the carriage of the mails at rates which should control until the next quadrennial readjustment. The appellee had upon July 1, 1910, and July 1, 1911, entered into a number of these contracts. On January 1, 1913, those important in this case had either one and one-half or two and one-half years to run. The establishment of the parcel post on that date substantially increased the amount of mail which it was required to carry under these contracts, although that increase in its burden brought with it no increase in compensation to appellee.

The act of March 4, 1913 (37 Stat. 791), made an appropriation for the expenses of the Post Office Department for the year ending June 30, 1914. While it was pending in the Senate and at the suggestion of the Postmaster General (R. 13) a proviso was added authorizing and directing a reweighing of the mails and a readjustment of com-

pensation to conform to the increased weight at a rate not exceeding that already provided by law.

The Postmaster General estimated that the reweighing alone would cost $500,000. (R. 13.) He estimated the total cost of carrying out his suggestion at $9,173,000. The Senate, however, increased the amount carried by the the bill as it passed the House only by $2,500,000.

The House refused to concur in the Senate's amendment and the conference committee recommended the following substitute, which became law:

> That on account of the increased weight of mails resulting from the enactment of section 8 of the act of August 24, 1912, * * * the Postmaster General is authorized to add to the compensation paid for transportation on railroad routes on and after July 1, 1913, for the remainder of the contract terms, *not exceeding five per centum thereof per annum*, excepting upon routes weighed since January 1, 1913, and to be readjusted from July 1, 1913, until otherwise provided by law. (R. 14.) 37 Stat. 791, 797.

The amount carried by the bill was left as the Senate had fixed it, at $51,500,000, and included, therefore, the $2,500,000 increase added in that body under the circumstances noted.

Thereafter the Postmaster General called upon the field officers of the department to report the approximate percentage of increase in weight of mails carried as a result of the establishment of the parcel post.

By applying this percentage of increase to the figures obtained at the last quadrennial weighing, a new figure was arrived at as the average daily weight carried under the new conditions. The maximum rate per mile per annum which, under Section 4002, R. S., was warranted by the average daily weight so ascertained was then compared with the contract rate, and the percentage of increase thus determined was applied to the total contract price, except that no increase in excess of five per cent was allowed. (R. 14, 15.)

The appellee was awarded additional compensation in accordance with this rule. Upon some routes this increase amounted to 5 per cent of what it had been receiving; upon many, increases less than 5 per cent were allowed; upon a few, no additional compensation resulted from the application of the rule adopted. (R. 16, 17.)

The total increase allowed was less by $7,768.31, than five per cent of the total contract rates for all routes. This suit was brought to recover this $7,768.31.

THE CONTENTIONS OF THE PARTIES.

The appellee contended, and the Court of Claims held (52 Ct. Cl. 338), that under the act of March 4, 1913, the Postmaster General was required to increase the amount of compensation to be paid the railroad company on each mail route by five per cent and that he had no discretion as to the percentage of in-

crease in compensation to be paid. The United States contends that the statute vested in the Postmaster General the authority to determine in any manner not capricious or purely arbitrary what percentage of increase should be paid on each mail route within the maximum stated; that the discretion so vested in him can not be controlled by the courts unless it is shown that it has been abused; and that in this case no abuse of discretion is shown.

THE ISSUES.

It results that the only questions to be determined in this case are:

First.—Did the act of March 4, 1913, vest in the Postmaster General discretion to determine the percentage of increase in compensation which should be paid on each railroad mail route?

Second.—Has he abused that discretion?

ARGUMENT.

I.

The Act of March 4, 1913, vested in the Postmaster General discretion to determine, within the expressed limit of five per cent, the percentage of increase in compensation to be paid in respect to each railroad mail route.

A. Such is the Plain Meaning of the Language Used.

The statute was intended to give to the railroads additional compensation for carrying the increased amount of mail which resulted from the establish-

ment of the parcel post so long, but only so long, as the existing contracts remained in force. It was plainly contemplated that when these should expire the rates should be readjusted upon the basis supplied by the customary reweighing in accordance with the law (R. S. sec. 4002) then in force, and at the rates thereby fixed. The provision that no additional compensation should be paid on the routes which in the ordinary course were to be adjusted as of July 1, 1913, points unmistakably to this conclusion. Readjustment was to be made on July 1, 1913, on the basis of weighings made after the establishment of the parcel post, and the additional compensation earned by the railroads would therefore be fixed in accordance with R. S. 4002 and the acts amendatory thereof.

As to contracts having longer to run, it was intended to permit relief. But the Congress did not say "The Postmaster General shall pay additional compensation in an amount equal to five per cent of the compensation now provided by the contracts," as it might have done had that been what it meant. It did not even lay down the rule which the Postmaster General should follow in apportioning additional compensation other than to impose a maximum limit of five per cent. Apart from the antecedent improbability of an intention to require the payment of a fixed rate of increase upon all routes regardless of the facts as to the actual increase of burden—a factor which would necessarily vary as between

routes—the language used plainly imports a vesting of discretion in the Postmaster General to determine what rate of increase should be allowed. The Congress said that it authorized him to add to what had been fixed by contract "not exceeding five per cent." This language is not to be disregarded and it is decisive. The natural import of the words is that no fixed percentage of increase was fixed by Congress but that within the limit expressed the Postmaster General, to whom authority was given to act in the premises, was to exercise a wise and just discretion.

This conclusion is reinforced by the circumstance that, at least since the first enactment of Revised Statutes, section 4002, in 1873 compensation to railroads for carrying the mails had been limited by a rule based upon the relative weights of mail carried. Nor is it without significance that the Congress in previous statutes relating to the question (act of Mar. 3, 1873, 17 Stat. 558; act of July 12, 1876, 19 Stat. 79; act of June 17, 1878, 20 Stat. 142; act of Mar. 2, 1907, 34 Stat. 1212) had uniformly used the language employed in the Senate draft of the present provision, namely, that the Postmaster General is "authorized and directed to readjust the compensation," etc. Here the words "and directed" are omitted. In those statutes a rule of mathematics are generally applicable to all mail carrying roads was laid down. Here the Congress was directing the exercise of executive discretion.

B. There is Nothing Which Requires the Statute to be Given Any Other Meaning.

1. THE CONSTRUCTION FOR WHICH THE APPELLEE CONTENDS IS NOT NECESSARY TO GIVE THE STATUTE EFFECT.

Although there is no ambiguity in the language used by Congress the rule is invoked that where a statute confers a power to be exercised for the benefit of the public or of a private person, permissive words may be construed as imposing a duty rather than conferring a discretion. But this rule is applicable only where "it is necessary to give effect to the clear policy and intention of the legislature" (*Thompson* v. *Carrol's Lessee*, 22 How. 422, 434), and, as was said in *Minor* v. *Mechanics' Bank*, 1 Pet. 46, 63:

> The ordinary meaning of the language must be presumed to be intended unless it would manifestly defeat the object of the provisions.

The rule amounts merely to this, that when it is obvious that a provision was intended to be mandatory the ascertained object of the legislature will not be defeated because of the use of permissive words. It has no application to such a provision as the one under consideration, where the language is plain and unambiguous, and it is plain that Congress intended to vest discretion in the Postmaster General. By the wise exercise of that discretion the object of Congress to deal fairly with the railroads was to be obtained.

2. THE LEGISLATIVE HISTORY OF THE ACT DOES NOT REQUIRE A DIFFERENT CONSTRUCTION.

There is here no ambiguity which warrants recourse to expressions in the debates, or even to committee reports or other matters incident to the legislative progress of the bill. *Caminetti* v. *United States*, 242 U. S. 470. Apart from that, the legislative history throws no light upon the intention of Congress which is of assistance in considering the present question. The Senate amendment providing for the reweighing of the mails was in fact rejected. Perhaps this was because Congress was unwilling to spend the $500,000 estimated as required for that purpose, perhaps because it would have given increased compensation for ordinary mail as well as for parcel post matter, at an estimated cost of $4,000,000. The proposal involved a departure from the long-established system of quadrennial weighings. There were many reasons why it should not be adopted.

Whatever the reason, the action taken shows only that Congress did not intend to give the Postmaster General the power to determine the rate of increase to be allowed by him by an actual reweighing of the mails other than in the regular recurrent routine. It does not show an intention to forbid him the power to determine the question in some other proper way.

II.

The manner in which the Postmaster General exercises his discretion can not be controlled by the courts unless an abuse thereof is shown.

Since it is clear that Congress did not intend to order that an increase in compensation of five per cent should be allowed on all mail routes, it follows that the Postmaster General had the power to determine how much should be allowed in each case, and since the act did not lay down any rules for his guidance, the manner in which he was to make this determination was discretionary with him. So long as he did not abuse that discretion, its exercise could not be controlled by the courts. *United States* v. *Ross*, 239 U. S. 530, 538; *Interstate Com. Comn.* v. *Illinois Central R. R.*, 215 U. S. 452, 470.

III.

The Postmaster General has not abused his discretion in this case.

The findings (R. 14 and 15) show that the plan actually adopted by him was to follow in substance the familiar rule of R. S. section 4002, and the acts amendatory thereof, except that instead of basing the readjustment on the increase in the amount of mail ascertained by actual weighings, he based it on estimates of such increases made by the field officers of the department. No complaint is made that these estimates were not substantially correct. Since he was not authorized actually to reweigh the

mails, this method was the best at his disposal of ascertaining the amount of the increase in the mails. And the method of calculation adopted was the nearest possible approach to the method of determining the compensation to be paid for carrying parcel post which was to be applied on those routes as to which the existing contracts expired on July 1, 1913. On that date contracts affecting one-quarter of the railway routes of the country would expire, and the rates were to be readjusted at that time in accordance with R. S. section 4002 and the acts amendatory thereof. The inequalities which resulted from the method used by the Postmaster General in determining the additional compensation to be allowed were exactly like those which were to result from the readjustments made July 1, 1913. They were the results of a system which had been in operation for many years, and was established under the authority of Congress. Therefore, no fault can be found with the method by which the Postmaster General determined the amount of additional compensation to be allowed.

Since the Postmaster General had the right to determine how much compensation, not exceeding five per cent, should be allowed on each route, and since there was no abuse of discretion in the way in which he made these determinations, the appellee can not complain because it did not receive the maximum compensation which the Postmaster General was authorized to allow.

CONCLUSION.

For the foregoing reasons, the judgment appealed from should be reversed, and the cause remanded with instructions to dismiss the petition.

LaRue Brown,
Assistant Attorney General.

Leonard Zeisler,
Attorney.

O

TOPICAL INDEX.

STATUTES.

AUTHORITIES CITED.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 201.

THE UNITED STATES, Appellant,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Appellee.

BRIEF FOR APPELLEE.

Statement of the Case.

This case comes before the court on appeal by the United States from a final judgment of the Court of Claims awarding the Atchison, Topeka and Santa Fe Railway Company $4,768.31.

The questions involved are disclosed by the Findings of Fact before the Court of Claims, and its conclusion of law, based thereon. Briefly stated the case is this:

During 1910 and 1911 the railway company entered into the usual contracts with the Post Office Department to carry the mail over a number of postal routes for the quadrennial terms ending June 30, 1914, and June 30, 1915, the compensation for such service to be based upon the average daily weight of mail carried over the respective routes (Record, p. 11).

While these contracts were in full force and effect, and on August 24, 1912 (37 Stats., 557), Congress established the Parcel Post, providing:

> "That hereafter fourth-class mail matter "shall embrace all other matter including "farm and factory products not now em- "braced by law in either the first, second "and third class not exceeding eleven pounds "in weight, nor greater in size than seventy- "two inches in length and girth combined, "nor in form or kind likely to injure the "person of any postal employee, or damage "the mail equipment or other mail matter, "and not of a character perishable within a "period reasonably required for transporta- "tion and delivery."

As a result of the establishment of this parcel post, a large amount of material previously carried as freight and express was thrown into the mails, resulting in a large increase in the average daily weight carried, with no provision made for any increased compensation (Record, page 12).

January 20, 1913, the Postmaster General addressed the Senate Committee a letter urging that on account of the increased weight of mails resulting from the establishment of the parcel post, a thirty-day weighing be had in the fall of 1913, as a basis for readjustment of compensation. He recommended in such case an appropriation for the increased weight due to parcel post a sum equal to approximately 10% of the amount previously estimated as necessary for appropriation (Record, page 13).

After a difference between the Senate and House, which will be referred to in detail hereinafter, Congress passed the act of March 4, 1913, (37 Stats., 791,797) providing *inter alia.*

> "That on account of the increased weight "of the mails resulting from the enactment "of section eight of the act of August "twenty-fourth, nineteen hundred and "twelve, the Postmaster General is author- "ized to add to the compensation paid for "transportation on railroad routes on and "after July first, nineteen hundred and "thirteen, for the remainder of the contract "terms, not exceeding five per centum per "annum, excepting upon routes weighed "since January first, nineteen hundred and "thirteen, and to be readjusted from July "first, nineteen hundred and thirteen, un- "less otherwise provided by law" (Record, page 12).

In carrying out the provisions of this act the Postmaster General did not allow 5% of the annual rate of compensation on each railroad mail route nor did he allow an increase of an equal percentage of the annual compensation on all said routes. He did allow increases of different percentages on different routes varying from 0% in some cases to 5 per cent in others (Record, page 14).

Appellee thereupon filed suit in the Court of Claims seeking to recover $7,768.31, being the amount which it claimed should have been paid under the aforesaid law, had 5 per cent increase in pay been uniformly applied on all the routes over which it carried the mail.

The Court of Claims gave judgment for the above amount, holding that the authority to add to the compensation did not permit an arbitrary rate on each route, but required that the percentage of increase should be equal and be equally applied to all; that the act was remedial and to be broadly construed to effect the purposes intended; that the word "authorized" in the law devolved a duty upon the Postmaster General and did not imply a mere discretion, and finally, that the authority to add "not exceeding five per cent" was not to be taken in its literal or restricted meaning, and did not leave it discretionary with the Post-

master General to pay such proportion as he saw fit, or none at all.

The United States, appellant, claims on appeal that the act of March 4, 1913, vested in the Postmaster General absolute discretion to determine what, if any, percentage of increase should be paid different companies on different routes, and not having abused that discretion it cannot be controlled by the courts.

ARGUMENT.

After the very full and complete opinion of Mr. Chief Justice Campbell in the court below, it comes as something of a surprise to be told by counsel for appellant that in reality there is no room for argument in this case; that the language of Congress is plain and unambiguous, needing no construction, nor recourse to its legislative history to ascertain its meaning, and that Congress clearly gave absolute and full discretion to the Postmaster General to do exactly as he pleased, even to allowing no increase at all.

Opposed to this view, we find it necessary to ascertain the intention of Congress and then to see that such intention is given effect.

1.

THE INTENTION OF CONGRESS.

Under our Constitutional form of Government it is the province of the Executive to execute or carry into effect the will of Congress as expressed in its various acts. It is not within the power of the Executive to substitute its own will for that of Congress, nor in executing the duty placed upon it to ignore the obvious purpose Congress had in mind.

In the words of Mr. Justice Swayne in *Atkins* vs. *Disintegrating Company* (18 Wall., 272): "The *intention* of the lawmaker constitutes the law," and these words express the fundamental rule of judicial interpretation of legislative action. It is therefore the *intention* of Congress in authorizing the Postmaster General "to *add* to the compensation not exceeding 5 per cent thereof per annum" that must be ascertained in this case.

By the act of August 24, 1912 (37 Stats., 557), Congress had authorized the parcel post, opening the mails to a great volume of matter that had previously been transported only by express and by freight. It was at once recognized that in fairness to the railroads some provisions should be made for additional compensation. The Postmaster General had in his report for 1911 recom-

mended a new system of adjusting compensation for mail transportation based upon the space basis. January 20, 1913, he wrote the Chairman of the Senate Committee on Post Offices and Post Roads as follows:

> "With reference to my letter of August 12, 1911, addressed to the Speaker of the House of Representatives, published as Document No. 105, transmitting the results of the Department's inquiry into the operation, receipts and expenditures of railroad companies carrying the mails and recommending the enactment of legislation to authorize the plan of adjusting railway-mail pay outlined therein, which recommendation was renewed in my annual report for the fiscal year 1911, I desire to direct your attention anew to the subject and to earnestly urge upon your committee the desirability of the enactment of the proposed legislation at this session of Congress.
>
> "The necessity for its passage is increased because of the inauguration of the parcel-post system on January 1, 1913, which will increase the weights of mail to be transported by railroads, for the carriage of which under the present law no additional compensation may be paid until there shall have been a weighing of the mails and a readjustment of pay based on the results thereof. Under the practice of the Department the country is divided into four weighing sections, one of which is weighed each year; consequently four years will elapse be-

fore some of the companies will receive additional compensation for the augmented weights which they will be required to carry. If the proposed new plan of adjustment be authorized and placed in operation it will enable the Department to compensate the companies annually from the date of the first readjustment for the increased service performed as well as correct inequalities in compensation which now exist.

"Should, however, the proposed legislation fail of passage it is believed that within a reasonable period after the parcel-post system is in operation, say in the fall of 1913, it will be just and equitable to the railroad companies to make provision for a general weighing of the mails on all railroad routes and make a readjustment of compensation for the carriage of the mails from the date of the commencement of the weighing, these adjustments to be made for the periods of one, two, three, and four years, according to the section, subsequent weighings to be made once in four years as at present. It is believed that a weighing for a period of thirty successive working days would be sufficient, and satisfactory to the companies. As this would require legislation I have the honor to suggest that in the event the above-mentioned plan be not enacted into law the following proviso be added to the item 'Inland Transportation by Railroad Routes' in the bill:

" '*Provided,* That on account of the increased weight of mails resulting from the establishment of the parcel post the Post-

master General is authorized to weigh the mails on railroad routes in the fall of 1913 for not less than thirty successive working days, and to readjust compensation from the date of the commencement of said weighing at not exceeding the rates provided by law.'

"To defray the expense of such a weighing and for the increased expenditure for railroad transportation resulting therefrom in the fiscal year of 1914, it will be necessary to add the sum of $9,173,000 to the amount previously estimated ($49,661,000) for the item 'Inland Transportation by Railroad Routes,' making the total amount of the estimate for that item $58,834,000. The estimate of $9,173,000 is made up of the following items:

"Estimated increase in compensation on account of increase in weight of regular mails since last weighing ...	$3,861,000
"Estimated increase on account of parcel post	4,812,000
"Estimated cost of thirty-five days' weighing and tabulation.....	500,000
"Total	$9,173,000

"Yours very truly,

"FRANK H. HITCHCOCK,

"Postmaster General."

It is to be specially observed that, based upon the recommended reweighing, the Postmaster General suggested an appropriation for the increased weight, due to the parcel post, a sum equal

to approximately 10% of the amount previously estimated as necessary for railway pay. This estimated increase, together with the estimated increase in compensation on account of the increase in weight of regular mails, and the estimated cost of the weighing, added $9,173,000 to the previous estimate of the Department, making a total estimate of appropriation of $58,834,000. This amount and stated estimates of increase are important in that they demonstrate that in fixing an increase of 5% without permitting a reweighing, Congress did not intend or propose that there should be a reweighing, which would include nearly $4,000,000 for increased weight in ordinary mail not covered by the parcel post, and in reducing the appropriation to $51,500,000 it appropriated the exact amount to be paid for full 5 per cent on all mail routes covered by the parcel-post provision of law. The provision recommended by the Postmaster General was included in the bill as it passed the Senate, as Senate amendment 26. The House refused to concur, and after two conferences the provision that finally became law was presented as substitute Senate amendment 26, and passed. In reporting this substitute amendment to the House the managers made a statement, set out in the findings of fact, the more pertinent part of which is:

> "Under the proposed substitute the spe-
> "cial weighing is dispensed with and no ad-

"ditional compensation is allowed for in-
"crease in the regular mails, and the Post-
"master General is authorized to allow *5*
"*per cent annually* of the compensation paid
"on routes on July 1, 1913, for the remain-
"der of the contract terms on all routes, ex-
"cepting those which are to be weighed sub-
"sequent to January 1, 1913, and to readjust
"from July 1, 1913. These excepted routes
"are those which are now being weighed,
"and which will receive through the present
"weighing an increase on account of the
"present increase in parcel post or fourth-
"class mail. *Five per cent* of the compensa-
"tion on the routes affected will mean about
"approximately $2,000,000 a year, which is
"a very material reduction under the esti-
"mates of the Department and the provis-
"ions of the Senate amendment."

No clearer expression of congressional intent could be framed. The Postmaster General is authorized to allow *5 per cent annually.* There is no suggestion that the Postmaster General is left any discretion as to the amount to be allowed. He is authorized to allow *"5 per cent"* on all routes. This was the understanding of the men who drafted this provision. It expressed their intention; it is the declaration upon which they recommended the passage of the bill by Congress, and consequently it is the intention of Congress itself. "The intention of the law-maker constitutes the law."

Not only was the intention of the conferees and of Congress itself clearly shown in this statement above quoted, but such intention is equally clear when we consider the reasons of the conferees for recommending the enactment. The plan of the Postmaster General was to reweigh all the mail, including the parcel post. The Senate agreed to this plan, but the House objected to the expense. The considerations that moved the conferees in adopting the provisions that became law were explained to the House by the chairman of the House Committee on Post-Offices and Post-Roads, and a member of the Conference Committee. (See Finding of Fact VI.) He explained that a general weighing was considered and rejected, because it involved the readjustment on a basis including increase weight, arising since the last quadrennial weighing, from other causes than the parcel post. A weighing of the parcel post alone was then considered and rejected because of the expense of the weighing,

> "So after ascertaining from the Depart-
> "ment that the increase in the parcel post
> "fourth-class matter in the mails would
> "probably amount to from 7 to 10 per cent
> "of the whole compensation, an agreement
> "was reached by the conferees to pay after
> "the 1st of July, 1913, the sum of 5 per cent
> "per annum of the whole weight of the mails
> "to cover the additional compensation for
> "parcel post."

The recommendation of the conferees was, therefore, in the nature of a compromise between the Senate, which wished increased compensation based on increased weight, and the House, which wished to eliminate a reweighing of the normal increase of the mail and to evade the cost of any weighing whatsoever. The result was a flat increase, placed at a figure well below that which the Department estimated a weighing would allow. There is no suggestion in the conferees' statement, nor in the chairman's explanation that the intention was to leave the increased compensation in the discretion of the Postmaster General, with a limitation of 5 per cent, but the fact is evident that Congress, having considered all the available statistics and recommendations, fixed 5 per cent as an economical and in some measure an equitable increase.

The legislative record we have set forth may, of course, be considered by this court in ascertaining the meaning of the act. It does not involve such recourse to debates as has been frowned upon, but only such an examination of the record as explains the motives influencing Congress in the enactment, and constitutes a consideration of the history of the times. Such a legislative record was considered by the Supreme Court in *Blake vs. National Banks,* 23 Wall., 307. Here a question regarding the income tax, under the act of July 14,

1870, was involved. The court in its opinion sets forth its examination of the Journals of Congress, showing the form in which the bill passed the House; its amendment by the Senate; the refusal of the House to agree to the Senate amendment; the appointment of a conference, and the passage of the bill, as agreed upon in conference. It justifies this method of ascertaining the legislative intent as follows:

> "Under these circumstances we are compelled to ascertain the legislative intention "by a recurrence to the mode in which the "embarrassing words were introduced as "shown by the journals and records and giving such construction to the statute as we "believe will carry out the intentions of "Congress.
>
> "The intention of the House upon the "Record we have quoted is plain, that body "proposed to tax all dividends, thereafter "declared by corporations, but yielded to "the indisposition of the Senate to assent to "that principle."

This is an explicit precedent for the method we ask the court to pursue in ascertaining the intention of Congress in the present case.

A recent case where the Supreme Court looked to legislative history and committee reports for enlightenment is *Lapina vs. Williams*, 232 U. S., 78. The question arose whether the deportation provisions of the Alien Immigration Act of 1907, based

on the act of 1903, applied only to immigrants. The court, in ascertaining the meaning of the act of 1903, said:

> "The legislative history of the act of 1903 "demonstrates that the elimination of the "word 'immigrant' and other equivalent "qualifying phrases was done deliberately."

The opinion then proceeds to quote the House Committee report and the Senate Committee report, and the fact that—

> "The Senate inserted the word 'immi- "grant' in one place, but it was eliminated "in conference."

It concludes that—

> "Whatever considerations may have com- "bined to bring about the judicial deter- "mination of the acts that preceded the re- "vision of 1903, the committee reports al- "ready cited sufficiently show that the lan- "guage of the new act was chosen not for "the purpose of adopting, but in order to "avoid that interpretation."

This constitutes an unequivocal approval of the review of its congressional history, including reports, in determining the meaning of legislation. We have followed this precedent in urging on the court in the present case the legislative history of the provision, and the conference report stating

the meaning of the provision to be that the "Postmaster General is authorized to allow 5 per cent annually of the compensation paid on routes on July 1, 1913, for the remainder of the contract term, on all routes, excepting those which are to be weighed subsequently to January 1, 1913."

Not only did Congress declare the provision intended a 5 per cent increase on all routes, but it worded the provision of the act in terms, which, in the light of earlier railway mail pay legislation, can bear no other interpretation.

It is an established rule in the construction of statutes that statutes in *pari materia* are to be considered in construing a later statute. This rule was set forth fully with elaborate citation of cases in United States *vs.* Freeman, 3 Howard, 556. At law 365 the court says:

> "The correct rule of interpretation is that "if divers statutes relate to the same thing "they ought all to be taken into considera- "tion in construing any one of them, and it "is an established rule of law, that all acts "in *pari materia* are to be taken together "as if they were one law."

To the same effect is *Brown vs. Duchesne,* 19 Howard, 183:

> "And it is well settled that in interpreting "a statute the court will look not merely to "a particular clause in which general words

"may be used, but will take in connection
"with it the whole statute (or statutes on
"the same subject) and the objects and pol-
"icy of the law, as indicated by its various
"*provisions* and give to it such a construc-
"tion as will carry into execution the will
"of the legislature as thus ascertained, ac-
"cording to its true intent and meaning."

These decisions are authority for asking the court to examine carefully the whole series of statutes relating to railway mail pay to determine what Congress intended when it authorized the Postmaster General to add to compensation, "not exceeding 5 per centum thereof per annum."

The fundamental and primary statute, on which subsequent acts have been based, was the act of March 3, 1873, which directed that the pay per mile per annum "shall not exceed the following rates, namely, etc." This language is substantially the equivalent of that now under consideration. That this language intended a fixed rate, and not a rate in discretion of the Postmaster General, is clearly indicated by the Supreme Court in *Wisconsin Central R. vs. U. S.*, 164 U. S., 190, where the court said (at page 205):

"The Postmaster General in directing
"payment of compensation for mail trans-
"portation, under the statutes providing
"the rate and basis thereof, does not act
"judicially" * * *

It is apparent that if the rate were to be fixed at the discretion of the Postmaster General his act would be judicial.

To be sure, this decision followed the acts of July 12, 1876, and June 17, 1878. But these acts specifically recognized the provisions of the act of 1873 as having fixed the rate. The act of July 12, 1876, reads:

> "That the Postmaster General be and he "is hereby authorized and directed to read- "just the compensation to be paid from and "after the first day of July eighteen hun- "dred and seventy-eight, for transportation "of mails on railroad routes by reducing "the compensation to all companies for the "transportation of mails ten per cent per "annum from the rates fixed and allowed "by the first section of an act entitled, 'An "act making appropriations for the service "of the Post Office Department for the fis- "cal year ending June thirtieth, eighteen "hundred and seventy-four, and for other "purposes,' approved March third, eight- "een hundred and seventy-three, for the "transportation of mails on the basis of the "average weight."

This was followed by the act of June 17, 1878, making a 5 per cent reduction from the rates "fixed and allowed" by the act quoted above.

And by act of March 2, 1907, there was made a reduction from "the present rates per mile per annum."

This constitutes a series of legislative enactments proclaiming that when a railroad company carries the mails without special agreement to the contrary, it carries them at the rates named in the statute. It also carried the verification of congressional intention in the act of 1873 to fix the rates at those which the Postmaster General was "not to exceed," and this intention has been confirmed by the uniform practice of the Post Office Department.

We are aware that the rates fixed by the statute have been mentioned by the courts as "maximum rates," and a power in the Postmaster General to pay lower rates implied, but this except in cases of special agreement has been always by way of *dicta*, as the Postmaster General has never attempted to compensate the roads, in the absence of such agreement, at other than the statutory rates.

According, then, to the principle that words in a subsequent statute are to be construed in the same meaning as the same words in a prior statute on the same subject, we must conclude that when, in the present act, Congress authorized additional compensation of "not exceeding 5 per centum" it meant that the full 5 per centum was to be paid in the absence of special agreement, just as in the act of 1873, when it said the pay "shall not exceed" the statutory rates, it meant that the full statutory

rates were to be paid, in the absence of special agreement.

We are asking the court to construe the provision in question in accordance with the intention of Congress, as ascertained by the application of certain well-established rules. Such a proceeding is justified even though the wording of the statute be apparently unambiguous. As the Supreme Court said in *Hawaii* vs. *Mankichi*, 190 U. S., 197, at 212:

> "The books are full of authorities to the effect that the intention of the law-making power will prevail even against the letter of the statute."

In the case of *Atkins* vs. *Disintegrating Company*, 18 Wall., 272, the question was whether a suit in admiralty was a civil suit within the meaning of the Judiciary Act of 1878, reading:

> "And no civil suit shall be brought before either of said courts against an inhabitant of the United States by an original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ."

The court, by Swayne, says (at page 301):

> "It may be admitted that an admiralty case is a civil suit in the general meaning of that phrase. But that is not the question before us. It is whether that is the meaning of the phrase as used in this section.

> The intention of the lawmaker constitutes the law. A thing may be within the letter of the statute and not within its meaning, or within its meaning though not within its letter. In cases of doubt the intention of the lawmaker is to be sought in the entire context of the section, statutes or series of statutes in *pari materia.*"

It was held the provision did not include suits in admiralty.

In *Heydenfeldt vs. Daney Gold & Silver Mining Company,* 93 U. S., 634, a title was in question under the Nevada Enabling Act of March 21, 1864 (13 Stat.. 32), providing:

> "That sections numbered 16 and 36 in every township, and where such sections have been sold or disposed of by any act of Congress, other lands equivalent thereto in legal subdivisions of not less than one quarter-section and as contiguous as may be, shall be and are hereby granted to said State for the support of common schools."

The court, in holding this not to be a grant *in præsenti,* said:

> "It is true there are words of present grant in this law, but in construing it we are not to look at any single phrase in it, but to its whole scope, in order to arrive at the intention of the makers of it. 'It is better always,' said Judge Sharswood, 'to adhere to a plain common-sense interpretation of the words of a statute, than to apply

> to them refined and technical rules of grammatical construction.' Gygers' Estate, 65 Penn. St., 312. If a literal interpretation of any part of it would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning when expressions in it are rendered ambiguous by their connection with other clauses than by considering the necessary for it, and the cause which induced its enactment. With these rules as our guide, it is not difficult, we think, to give a true construction of the law under consideration."

After holding the act is not a present grant, the court goes on to say:

> "This interpretation, although seemingly contrary to the letter of the statute, is really within its reason and spirit. It accords with a wide public policy, gives to Nevada all she could reasonably ask and acquits Congress of passing a law, which in its effects would be unjust to the people of the Territory, besides no other construction is consistent with the statute as a whole and answers the evident intention of its makers to grant to the States *in præsenti* a *quantity* of lands, equal in amount to the 16th and 36th sections in each township."

A leading case in which the court disregarded the letter of the statute is *Holy Trinity Church vs.*

United States, 143 U. S., 457. The question was whether the act prohibiting the importation of alien labor under contract (23 Stats., 332), included an English minister brought to New York under contract to serve a church.

Here the court says:

> "It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service and implies labor on the one side and compensation on the other. Not only are the general words labor and service both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning to them is added of any kind and further as noticed by the circuit judge in his opinion, the fifth section which makes specific exceptions, among them professional actors, artists, lecturers, singers and domestic servants, strengthens the idea that every other kind of labor and service were intended to be reached by the first section. While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within the spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application."

These cases and others like them make it apparent that the courts will not hesitate to enforce the will of Congress, even though that will be not exactly expressed in the statute.

II.

If any discretion was vested in the Postmaster General it was to fix a flat increase not exceedceeding 5 per cent for all routes.

Though we are satisfied the court will find the will of Congress to have been that a 5 per cent increase should be granted to all routes, nevertheless if it should be held there was discretion vested in the Postmaster General, that was a discretion to grant a flat increase to all routes.

The act reads:

> * * * the Postmaster General is authorized to add to the compensation paid for transportation on railroad routes * * * not exceeding five per centum thereof per annum."

There appears no vestige of support for the theory that he was to increase the pay of one route 2 per cent, another 4 per cent, and so on.

The act does not say he may increase the pay on "a railroad route," or on "any railway route," but on "railway routes." All are to be treated in the same manner without distinction. We may refer

again to the previous legislation on the subject. Always there has been a reduction applicable to all routes or on certain routes distinguished by Congress by the weight of mail carried. The acts of 1876 and 1878 established flat reductions on all routes. The act of 1907 reduced the rate 5 per cent on the excess over five thousand pounds on routes carrying a daily average of over five thousand and less than forty-eight thousand pounds, and fixed special rates on the excess over forty-eight thousand pounds. The policy of the law being to make like rates to all routes, there is no reason to believe without additional evidence that Congress, in the present instance, intended to vest the Postmaster General with unlimited discretion to give different rates to different routes at his will.

In allowing 5 per cent increase to certain routes the Postmaster General exercised whatever discretion was reserved to him, and he was bound by the law to make an equal allowance to all routes. Sec. 4 of act approved July 28, 1916 (39 Stat. 425), provided that on account of the increased weight of mails resulting from the Postmaster General's order increasing the weight of parcel-post packages, the Postmaster General was authorized

> "to add to the compensation * * * for "the remainder of the contract terms, not "exceeding one-half of one per centum "thereof per annum."

Sec. 3 of the same act provided an increase under another order of the Postmaster General of "not exceeding one per centum per annum" and in both instances the Postmaster General made a flat increase on ALL mail routes of one and one-half per centum.

III.

THE METHOD PURSUED BY THE POSTMASTER GENERAL OF FIXING THE PERCENTAGE OF INCREASE WAS NOT A VALID EXERCISE OF DISCRETION.

Granting, for the purpose of argument, any authority in the Postmaster General to fix increases at any percentage less than five, he is nevertheless bound to exercise a discretion neither arbitrary nor abusive.

What could be a better test of the reasonableness of the discretion exercised than whether it is logical and whether it is legal?

Let us apply these tests to the present case.

The method of the Postmaster General was to have his agents estimate the percentage the increase each route carried after January 1, 1913, bore to the weight carried just prior to January 1, 1913. Both these weights were merely estimated. The per cent so found was then applied to the average daily weights found at the last weighings; that is to say, in 1910 or 1911, on the routes in question. Adding this percentage to the average daily

weight, the Postmaster General ascertained a new so-called average daily weight. He then computed the rate of compensation per mile on the new average weight and subtracted from it the rate on the average daily weight. He then found the percentage this difference bore to the original rate per mile, and where this was 5 per cent or less, increased the annual compensation by such percentage. We thus have a resultant percentage of increased pay related only by an involved and illogical method of computation to an estimated increase of weight of mail. The absurdity appears in the example shown by the Postmaster General's report on Route 153013, where an estimated increase of 8 per cent of weight resulted in increased compensation of only 3 27/100 per cent.

An increase exactly proportioned to the estimated increased weight of the mails might at least have the virtue of reasonableness, but the system employed entirely lacks this merit. To begin with, the estimated percentage of increased weight was computed on the difference between the estimated weight before and after January 1, 1913. It is, of course, apparent that just prior to January 1, 1913, the mails, allowing for natural increase, were much heavier than they were at the time of the quadrennial weighing in 1910 or 1911. There is no way of telling what percentage the increase due to the parcel post bore to the weight at the time of the

quadrennial weighings, but certainly it is a larger percentage than that which it bore to the estimated weight prior to January 1, 1913. There is, therefore, no logic in applying the percentage so determined to the weights found at the quadrennial weighings.

Having progressed thus far illogically, the Postmaster General proceeded to interpose a further indirection.

He does not apply this percentage of estimated increase to the annual rate, but, computing a new average weight, ascertains the rate per mile payable for such weight. The increased rate so found is not directly proportioned to the increased weight, because the legal rate is fixed not exactly in proportion to weight, but at a stated rate within given limits of weight. Using the difference between the rate so ascertained and the rate fixed after the quadrennial weighing as a quotient to find its percentage to the former annual rate, a percentage is obtained; is applied to the annual compensation, and the increase computed. This results in a different relation between the estimated increase of weight and the allowed increase in compensation in different cases.

As a result of this double indirection we have on five typical routes, 153003, 153013, 153021, 153025 and 153031, an average percentage of increase of 9.6 per cent, resulting in an average increase in pay of 3 17/100 per cent.

The method of the Postmaster General was therefore arbitrary and in abuse of any discretion which may have resided in him.

The method is, moreover, illegal. It purports to be based on an average daily weight as computed from estimates of departmental agents. Now the act of March 3, 1873, provides that the average daily weight shall "be ascertained in every case by the actual weighings of the mails." This provision has never been repealed, directly or indirectly, and is therefore a part of the existing law of railway-mail compensation. As was said in *Henderson's Tobacco,* 11 Wallace, 652:

> "Where the powers or directions under several acts are such as may well subsist together, an implication of repeal cannot be allowed."

No average daily weight can therefore be ascertained without a weighing, and any method based on an estimated average daily weight is consequently illegal.

The Postmaster General attempted by indirection to do what Congress expressly declined to do—make a readjustment based on the weight of increased mails—and in so doing acted illogically, illegally and in abuse of any discretion which may have been vested in him.

Counsel for the appellant argue that the plain meaning of the language used by Congress was to

vest in the Postmaster General a discretion to determine within the limit of five per cent the percentage of increase to be paid to each railroad mail route, and quotes authorities, that where the language of Congress is plain, recourse to interpretation or construction is not permissible. We have hereinbefore referred to different authorities where the courts have held that the language of an act is not conclusive, and that the *intention* of Congress is the controlling factor. These different authorities, pro and con, are in reality for the convenience of the courts. If the court thinks the language used in the act of Congress means just what it says, the court finds comfort in one line of decisions; if, however, it concludes Congress meant something different, it finds ample authority to look into the history of the times, through reports and debates. Both lines of authority, however, are in accord in sustaining the underlying principle that under any and all conditions the Executive is limited to carrying out the will or intention of Congress. If this court, therefore, is satisfied from what was done in Congress that Congress *intended* a flat increase of five per cent, and certainly did not intend that the Postmaster General should exercise a discretion based upon either an estimate or the actual weight of mails, the judgment of the Court of Claims should be affirmed.

In *Cochnower vs. United States,* decided by this court January 13, 1919, the court was called upon to consider an act passed March 4, 1909 (35 Stats., 1065), providing "that the Secretary of the Treas-"ury be and he is hereby authorized to increase "and fix the compensation of inspectors of customs "as he may think advisable not to exceed in any "case the rate of six dollars per diem."

The court held that the case was one simply of statutory construction, dependent primarily on the words "increase and fix," and following the long-settled practice of the court, as described in the opinion in this case by the Court of Claims, construed the word "authorized" as equivalent to "directed," so as to make the same mandatory and not discretionary, and give the natural meaning to the words "increase and fix" held that this did not vest in the Secretary an unlimited discretion contended for by the Government, but left him bound to increase and fix the compensation at the rate stated in the law.

In conclusion, it should be recalled that Congress having authorized the Postmaster General to contract for the transportation of mail without bidding, fixed the schedule of rates of compensation, thereby constituting itself the rate-making body, and has since by repeated enactments exercised its rate-making authority. To divest itself of this power and to transfer it to the Postmaster

General would require a clear legislative expression of that intention. No such expression appears in the enactment under consideration, but, on the contrary, in the line of this congressional history, the language plainly indicates the intention of Congress to exercise its authority and relieve the mail-carrying routes by increasing their annual compensation by 5 per cent on account of the parcel post, and as demonstrating that purpose it added to the estimated appropriation of $49,000,000 $2,500,000, or exactly five per cent.

Conclusions.

We believe it clearly appears from what has been said:

(1). Congress had previously established the parcel-post service without providing additional pay for the carriers.

(2). At the time of the passage of this law Congress did desire to compensate the carriers because of the assumed increase in the weight of the mails.

(3). It was first proposed (in the Senate) to reweigh the mails for this purpose and to pay the statutory rates for the exact weights.

(4). Congress was told that a reweighing of the mails would entail an expense of $500,000.

(5). Congress was told further that the increase in railway-mail compensation, resultant upon a re-

weighing, would be $8,600,000 annually, of which the increase on account of the parcel post alone would be about $4,800,000, or 10 per cent.

(6). Congress did not wish to pay the railroad companies an additional $8,600,000 per annum.

(7). It took away from the Postmaster General the proposed means of ascertaining the exact weights and substituted nothing therefor except that——

(8). It avoided the risk of paying $8,600,000 per annum and incidentally saved the $500,000 expense of reweighing by arbitrarily providing an increase of "not exceeding" 5 per cent.

(9). *In making this substituted provision, Congress used language legally identical with that employed in the basic statute naming railway-mail rates, which language for more than 40 years has been construed as requiring the payment by the Postmaster General of the rates named in the statute which he was "not to exceed"—from all of which the conclusion is irresistible that Congress intended that the act of March 4, 1913, should operate the same as had the act of 1873; and*

(10). For the purpose of carrying out its actual intention, Congress *did* appropriate exactly 5 per cent over the $49,000,000 carried by the House bill, which was the Department's ultimate of the amount needed to pay for ordinary mail transportation.

(11). It is significant that in the very same paragraph of this act, but with reference to another matter, where Congress did intend to vest the Postmaster General with discretion, it took the pains to say so. It is reasonable to assume that if it had intended to give him any discretion over the parcel-post pay, it would have either used the same language it had used with reference to the other matter, or that the appropriation of the additional 5 per cent would have been qualified in some way, instead of being absolute, and its disbursement governed by the same customary direction that had never anywhere received the construction contended for by the Government in this case.

Respectfully submitted,

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UNITED STATES *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

No. 201. Argued March 11, 12, 1919.—Decided April 14, 1919.

The Act of March 4, 1913, c. 143, 37 Stat. 791, 797, authorizing the Postmaster General to add, not exceeding 5 per cent. per annum, to the compensation of railroads, under certain pending contracts for transportation of mail, left the increases, within that limit, to his discretion; the plain import of the words used must control. P. 454.

52 Ct. Clms. 338, reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Brown, with whom *Mr. Leonard Zeisler* was on the brief, for the United States.

Mr. Alex. Britton, with whom *Mr. Evans Browne* and *Mr. Francis W. Clements* were on the brief, for appellee, invoked the legislative history of the act to prove that an extra allowance of full 5 per cent. was intended, without giving any discretion to the Postmaster General to fix a smaller amount. This was so plain, especially if the act be taken as a whole and with others *in pari materia*, that it ought even to prevail against the letter of the enactment. (1) *Blake* v. *National Banks*, 23 Wall. 307;

Lapina v. *Williams*, 232 U. S. 78; (2) *United States* v. *Freeman*, 3 How. 556; *Brown* v. *Duchesne*, 19 How. 183; (3) *Hawaii* v. *Mankichi*, 190 U. S. 197, 212; *Atkins* v. *Disintegrating Co.*, 18 Wall. 272; *Heydenfeldt* v. *Daney Gold Mining Co.*, 93 U. S. 634; *Holy Trinity Church* v. *United States*, 143 U. S. 457.

In making this substituted provision, Congress used language legally identical with that employed in the basic statute fixing railway-mail rates, which language for more than forty years has been construed as requiring the payment by the Postmaster General of the rates named in the statute which he was "not to exceed"—from all of which the conclusion is irresistible that Congress intended that the Act of March 4, 1913, should operate the same as had the Act of March 3, 1873. *Wisconsin Central R. R. Co.* v. *United States*, 164 U. S. 190, 205.

If any discretion was vested in the Postmaster General, it was to fix a flat increase not exceeding 5 per cent. for all routes. There appears no support for the theory that he was to increase the pay of one route 2 per cent., another 4 per cent., and so on. In allowing 5 per cent. increase to certain routes, the Postmaster General exercised whatever discretion was reserved to him, and he was bound by the law to make an equal allowance to all routes.

The method pursued by the Postmaster General of fixing the percentage of increase was not a valid exercise of discretion.

Memorandum opinion by MR. JUSTICE MCREYNOLDS.

During 1910 and 1911 the appellee railway company entered into customary arrangements with the Post Office Department to carry mail over a number of routes for quadrennial terms ending June 30, 1914, and 1915, com-

pensation to be based upon ascertained weights. While these were in force, by Act of August 24, 1912, c. 389, 37 Stat. 557, Congress directed establishment of the parcel post service without providing for any additional compensation on account of the large increase in weights which would surely follow.

The Postmaster General called attention to the matter January 20, 1913; and after much consideration the following clause was incorporated in the Act of March 4, 1913, c. 143, 37 Stat. 791, 797:

"That on account of the increased weight of mails resulting from the enactment of section eight of the Act of August twenty-fourth, nineteen hundred and twelve, . . . the Postmaster General is authorized to add to the compensation paid for transportation on railroad routes on and after July first, nineteen hundred and thirteen, for the remainder of the contract terms, not exceeding five per centum thereof per annum, excepting upon routes weighed since January first, nineteen hundred and thirteen, and to be readjusted from July first, nineteen hundred and thirteen, until otherwise provided by law."

Acting under this provision, the Postmaster General refused to allow increased compensation of five per centum upon all routes, but apportioned payments among them—never in excess of five per centum—according to a carefully worked out formula which he deemed appropriate. Appellee sued for the difference between amount actually received and what it would have received if five per centum had been added. Considering history of the legislation and intent of Congress supposed to be indicated thereby the Court of Claims held that the act "required the Postmaster General to add 5 per cent. to the compensation being paid on all of said routes, and he having failed to do so that the plaintiff is entitled to recover the difference sued for." 52 Ct. Clms. 338, 361.

We are unable to agree with this conclusion. The language of the enactment is clear and we think it vested in the Postmaster General a discretion which, so far as shown by the record, has not been abused. We are not unmindful of the burden imposed upon appellee nor of the circumstances which lend color to a different conclusion; but these are not sufficient to justify a disregard of the plain import of the words which Congress deliberately adopted.

The judgment below must be reversed and the cause remanded with direction to dismiss the petition.

Reversed and remanded.